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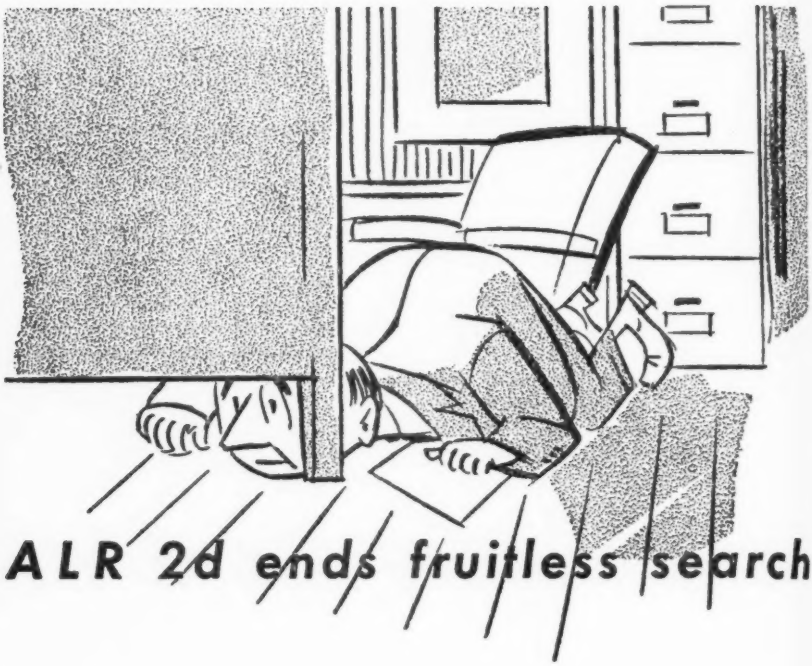

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Massachusetts Law Quarterly

Volume XLII JULY, 1957 Number 2

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OFFICERS ELECTED AT THE ANNUAL MEETING
June 15, 1957

RAYMOND F. BARRETT
President

RAYMOND F. BARRETT, *President* ..... Quincy
LINCOLN S. CAIN, *Vice-President* ..... Pittsfield
LIVINGSTON HALL, *Vice-President* ..... Concord
HAROLD HORVITZ, *Vice-President* ..... Newton
BERTHA R. KIERNAN, *Vice-President* ..... Chelsea
STANLEY B. MILTON, *Vice-President* ..... Worcester
GERALD P. WALSH, *Treasurer* ..... New Bedford
FRANK W. GRINNELL, *Secretary* ..... Boston

Members at Large — Board of Delegates

MILTON J. DONOVAN ..... Springfield
JAMES H. FITZGERALD ..... Brockton
A. ANDRE GELINAS ..... Fitchburg
FRANK L. KOZOL ..... Brookline
LAURENCE M. LOUGEE ..... Worcester
RICHARD B. JOHNSON ..... Swampscott
PAUL B. SARGENT ..... Weston

RECORD OF THE FORTY-SIXTH ANNUAL MEETING OF THE MASSACHUSETTS BAR ASSOCIATION

June 15, 1957

The Forty-Sixth Annual Meeting of the Massachusetts Bar Association was duly called and held at 2:30 p.m., Saturday, June 15, 1957 at the Mayflower Hotel, Plymouth, Massachusetts with President Schneider presiding.

REPORTS OF OFFICERS AND COMMITTEES

Upon motion duly made and seconded, it was, unanimously

VOTED: That the reading of the minutes of the last Annual Meeting be waived.

The Treasurer's report was presented to the meeting and a copy is annexed to these minutes. Upon motion duly made and seconded, it was, unanimously

VOTED: That the Treasurer's report be accepted and placed on file.

Mr. Bodfish, Chairman, reporting for the Nominating Committee submitted the following nominations:

President

RAYMOND F. BARRETT, Quincy

Vice-Presidents

LINCOLN S. CAIN, Pittsfield
HAROLD HORVITZ, Newton
LIVINGSTON HALL, Concord
BERTHA R. KIERNAN, Chelsea
STANLEY B. MILTON, Worcester

Treasurer

GERALD P. WALSH, New Bedford

Secretary

FRANK W. GRINNELL, Boston

Members at Large—Board of Delegates

MILTON J. DONOVAN, Springfield
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LAURENCE M. LOUGEE, Worcester
A. ANDRE GELINAS, Fitchburg
RICHARD B. JOHNSON, Swampscott
PAUL B. SARGENT, Weston

The President announced that no other nominations having been received in writing as required by the by-laws the nominations would be closed. Upon motion duly made and seconded, it was, unanimously

VOTED: That the report of the Nominating Committee be accepted and that the Secretary be authorized to cast one ballot for those nominated.

The Secretary thereupon cast the ballot and the nominees were declared duly elected.

OTHER BUSINESS

Mr. Clinton Kellogg, President of the Norfolk County Bar Association, presented to President Barrett a gaval as a momento from the Norfolk County Bar Association to which Mr. Barrett responded.

On motion of Mr. Buckley of Abington it, upon motion duly made and seconded, unanimously

VOTED: To extend a rising vote of thanks to the retiring officers for their services to the Association.

VOTED: To extend a rising vote of appreciation to Mr. Fitzgerald and Mr. Callan for the fine work of their committee in arranging for and conducting this Annual Institute.

Mr. Gilbert of Brockton spoke on the Jenkins-Keogh bill now pending in Congress and urged the Bar actively and vocally to support the bill. On Mr. Bodfish's motion which was duly seconded, it was, unanimously

VOTED: That the members of the Massachusetts Bar Association here assembled do hereby endorse the substance of the Jenkins-Keogh bill and authorize and request the Secretary of the Association to communicate this vote to our Senators in Washington.

Reverend Robert F. Drinan called attention to the fact that a similar bill has been adopted in England and that it appeared that the only objection voiced in Washington came from the Treasury Department and was based upon the prospective loss of revenue. Mr. Donahue of Holyoke informed the meeting that the Jenkins-Keogh bill is now in the House Ways and Means Committee and suggested that the Secretary should communicate the foregoing vote not only to the Senators but also to Speaker Rayburn, Majority Leader McCormack and Minority Leader Martin urging them to use their efforts to have the bill taken out of the Committee and brought upon the floor for action.

Reverend Drinan made a plea for assistance for young law students, pointing out that benefits under the G.I. Bill are no longer available and that existing scholarship plans need implementation. He suggested the consideration of direct scholarship appropriations by Bar Associations in cooperation with the law schools. He also cited the need for an increase in the opportunities and facilities for advanced legal education.

Mr. George K. Black of Boston called attention to a bill pending in the State Legislature and recommended by a Judicial Council which would repeal the statute making assessments of land admissible as evidence of land value in eminent domain cases and

MOVED: That the members of the Massachusetts Bar Association here present urge the passage of the pending bill to repeal the statute permitting assessed values of land to be admitted in evidence in eminent domain cases.

After discussion and upon motion by Mr. Proctor, it was

VOTED: To lay the matter on the table.

Mr. Charles Kelly of Athol cited the need for greater activity in the public relations field by lawyers and bar associations, particularly with reference to newspaper advertising and other media directed to the development of a greater understanding on the part of the public of the function of the profession and the use of its services by the public. Upon motion duly made and seconded it was

VOTED: That the President appoint a committee to investigate proposals for an active public relations campaign and the means of getting help in carrying out such a campaign, the committee to report back to the Association.

After some discussion President Barret pointed out that Albert West, director of public relations for the Association, after having worked for several years without compensation has received modest remuneration during the past two years. The President pointed out that the Executive Committee had been slowly building up its public relations program as funds were available for the purpose. Upon his suggestion Mr. West outlined the program carried on during the past four years and the programs now in progress and contemplation citing particularly the pamphlets for insertion with bank statements, the reprint of the Morison and Wright speeches, the newspaper series and the heritage program.

Miss Catherine Sage of Northampton expressed the view that there was no need to seek public approbation and that services well rendered should bring adequate results. Mr. Harold Putnam, of Needham urged that the proposed committee consider the need for a publicity director paid full time. Mr. John J. O'Neill

MOVED: That it is the sense of this meeting that Albert West be placed upon a full time basis of compensation as publicity director.

No action was taken on this motion. Mr. Kelly urged that our publicity activity be aimed directly at each member of the public as a prospective client rather than in a generalized manner to the entire public.

There being no further business to come before the meeting, it was upon motion duly made and seconded, unanimously

VOTED: To adjourn.

The meeting was thereupon adjourned at 3:55 p.m.

A true record

ATTEST:

/S/ WILLIAM B. SLEIGH, JR.
Assistant Secretary.

SIXTEENTH MASSACHUSETTS LAWYER'S INSTITUTE AND CONVENTION AT PLYMOUTH, JUNE 14, 15 AND 16, 1957

The Sixteenth Annual Massachusetts Lawyer's Institute and Convention was held at the Mayflower Hotel, Plymouth (Manomet Point), on June 14 and 15, 1957.

There was a record attendance by members of the association and their wives (husbands) and the weather, although warm, was perfect for the occasion.

At the opening session on Friday, June 14, President Joseph Schneider presented the greetings on behalf of the Association. Max Rosenblatt, Assistant Attorney General, J. Burke Sullivan, Esq., and Alexander S. Beal participated in a symposium on "Land Damage and Eminent Domain." Mr. Rosenblatt presented the government's point of view, Attorney Sullivan the petitioner's point of view and Alexander S. Beal presented the expert appraiser's

AT 16th INSTITUTE AND CONVENTION

Senator JOHN F. KENNEDY, *Chief Justice* PAUL F. REARDON
Retiring President JOSEPH SCHNEIDER *and Treasurer* GERALD P. WALSH.

point of view. All of the speakers were thoroughly prepared and gave an able and interesting presentation.

As in Ye Olde Manner, on Friday evening a shore clambake, bonfire and community singing was enjoyed by all the guests. George L. Wainright, Esq., with his banjo, proved to be highly qualified as a Master of Ceremonies and "Art Kendrew" on the electric organ was excellent. Among the talented soloists were Hon. Wilfred Paquet, Hon. Thomas H. Stapleton, George F. Garriety, Esq. and President Schneider. Those lovers of barber shop quartets were treated to the best in the Jolly Whalers of New Bedford, whose serenade continued to at least 11 o'clock that evening. To say the least, this portion of the program was the most enthusiastically received.

On Saturday morning, under the direction of Livingston Hall and with Hon. Kenneth L. Nash, Chairman of the Administrative Committee of the District Courts, and Hon. John A. Daly, Executive Secretary of the Supreme Judicial Court, the timely topic of "Operation of the District Courts Under Full Time Judges" was presented. The session was well attended and proved to be most informative.

At 10:30 o'clock a.m. and expertly presided over by Gerald P. Walsh, Esq., a panel discussion on "Trial by Newspaper," an explosive topic, was enjoyed by all. Those participating and equal to the task were Dwight L. Allison, Paul T. Smith, both of the Boston Bar, Joseph W. Harvey of the Boston Globe and Casper Dorfman of the Daily Record-American.

At the luncheon which followed, we were most privileged to have as our guest speaker, our Junior Senator, John F. Kennedy, who spoke informatively on the very important subject of breach of trust of union funds.

The Annual Business Meeting of the Association was held at 2:30 o'clock p.m. and although the weather was extremely warm, there was a very fine attendance. President Joseph Schneider presided and after the election of officers and reading of reports, a lively discussion period followed. Interest in the Association's activities kept many present until about 5 o'clock p.m. when the meeting was adjourned.

Dinner in the evening closed the Institute at which President Joseph Schneider ably presided. All were accorded the unexpected pleasure of hearing from Captain Allan Villiers who had just successfully guided the Mayflower II from England to Plymouth. President Schneider, on behalf of the Association, presented the Captain with a Citation. After dinner the meeting adjourned to the 1620 Room where our Senior Senator, Leverett Saltonstall, spoke to a large audience on foreign affairs.

Raymond F. Barrett, our newly elected President, then spoke to

the members and informed them briefly of his intended program for the coming year.

The program of the ladies commenced with a tea on Friday afternoon at the Colonial Room where they enjoyed M. Elizabeth Randall, Graphologist, who gave individual handwriting readings and a talk on "Discover Yourself Through Your Handwriting." On Saturday afternoon on the terrace at the Shore Club, Helen Morgan, nationally-known stylist, presented a most interesting and entertaining program of the subject of poise, clothes, make-up, hair styling, and comportment.

On behalf of the Massachusetts Bar Association, sincere thanks and appreciation are expressed to all those who assisted in the arrangements or participated in the program and particularly to *Co-chairman* Hon. L. Francis Callan, Mrs. Marjorie MacLeod, *Secretary*, Albert West, Esq., *Public Relations Director*, Mrs. Louise Prince, *Chairman of the Ladies' Committee*, the committee members, and those women who served as pourers and hostesses.

JAMES H. FITZGERALD, *Chairman*
1957 Massachusetts Lawyer's Institute

MASSACHUSETTS BAR ASSOCIATION

Citation to

CAPTAIN ALLEN VILLERS

~

The history of civilized freedom is the story of individual thought followed by courageous action. At times free men must think back to their heritage lest they lose what they have. One of the distinguished sailors of today has re-enacted for us the voyage of the little band of brave men and women, with thinking leaders of character and conscience, who sailed for the wilderness in 1620 in search of the freedom we now enjoy.

The Massachusetts Bar Association is honored to have as its guest the gallant Captain of the second Mayflower and to present to him this citation in appreciation of his leadership in reviving the Pilgrim story as a part of the birth of the American nation.

EMINENT DOMAIN TAKING — PRACTICE AND PROCEDURE — A NEGLECTED FIELD OF PRACTICE

(A discussion at the Plymouth Institute, June 14, 1957)

The discussion by three men thoroughly familiar with the subject was one of the most interesting and helpful sessions that we have had at the Institute since its beginning in 1941. The three men talked instead of reading and we reprint below J. Burke Sullivan's outline of the preparation of a case by a petitioner. The remarks of Assistant Attorney General Max Rosenblatt and of Alexander S. Beal—an experienced expert appraiser—showed that the net result of the discussion appeared to be that, while the amounts involved in Massachusetts land taking by local State and Federal government for many varied purposes exceeded two billion dollars, most lawyers did not know their way in land damage cases.

In four years representing the Government in about 4,000 cases, most of which were settled without trial, Mr. Rosenblatt said the number of lawyers for the landowners who had really mastered their cases and the way to begin them and to prepare them was surprisingly small. All three men suggested that the law schools pay attention to at least elementary instruction in this field about validity of taking, time for filing petitions, sensible instead of absurd appraisals, factors in appraisals, evidence admissible and appraisers (even experienced men) who can not only appraise but state clearly the basis and the reasons for their valuations as witnesses under direct and cross-examination on the stand.

With this introduction we think the bench and bar will find the following outline of factors in preparation helpful. It means work but that is what the clients are entitled to.

F. W. G.

When your client enters your office with a notice of taking in his hand, your first consideration is the:

1. PETITION—CHAP. 79—14.
   a. Form "To the Hon."
   b. Time—1 year if a taking Chap. 79, S. 16—except highway —Date of Entry—usually close to date of recording.

For damages where no taking 1 year from completion of work causing damage—See Webster Thomas et al vs. Commonwealth 1957 **AS 761.**

As to right to damage where no taking—compare Webster Thomas with *Sullivan* vs. *Commonwealth* 1957 AS 463.

If late—only remedy is Legislature.

c. Contents:

Must contain description of property and if not complete, of that taken, Frost Coal Co. v. Boston 259/354.
Worthy of note—Trs. of B. U. vs. Commonwealth 286/57 re: contiguous.
Well to incorporate Taking Plan by reference, as aid to future conveyancer.
Must state existence of mortgages, if any, Johnson v. Lowell 240/546—and name and address of mortgagees—no amount.
All interests less than fee—life estates leases, etc. and prayer for Orders of Notice to be served on these. For apportionment Ch. 79 S. 22 Mills v. Samuels 230/1.
Allegation of Damage—but no figure as ad damnum.

Jury claim in Petition—

2. PREPARATION FOR TRIAL:

a. Visual aids. Model in Gypsum case, 329 Mass. 130.

b. Mathematical accuracy of figures.

c. Knowledge of measure of damages Ch. 79 S. 12.
Rule—If complete taking, fair market value.
Rule—In Epstein v. Boston Housing Authority, 317 Mass. 297. "Highest, etc."
Rule—If partial, "Shall be added the damage to remainder" —Before and After Rule.
No recovery for loss of business or interruption.
No recovery for loss of good will.
No recovery for cost of moving (Fed. Rule Korean Act).

d. Study Act for right to damages—Quabbin Act, Mystic Bridge Authority—Gypsum case, 329 Mass. 130. Mass. Turnpike Authority G. L. Chap. 81 S. 7 Sullivan and Webster Thomas cases, supra par. 1b.

e. Must prepare carefully with expert.

3. THE TRIAL

a. Shall be advanced for speedy hearing Ch. 79 S. 34.

b. By the Court unless either party request Jury—Ch. 79 S. 22. Discuss Jury Trial and Recess Comm. Bill House No. 2738 of 1957.

c. Right to view—if Jury Trial—Ch. 79 S. 22.

d. Who may testify:

1. Owner—Rubin vs. Arlington, 327 Mass. 382.

2. Old Rule—Town official—one familiar with values for long time—Assessors.
3. Expert. Read Muzi v. Commonwealth, 1956 A. S. 1363. Newton Girl Scout Council Inc. vs. Massachusetts Turnpike Authority, 1956 A. S. 1477.

e. Admissible Evidence:

1. Purchase price if recent.
2. Income and Expenses—Net.
3. Rent of comparable.
4. Sales—Comparable (Similar) Time—Market
   Bowditch v. Boston 164/107 2½ yrs. before proper.
   Peabody v. N. H. RR 187/489 after proper.
   But Chandler and Jamaica 122/305 3 yrs. after—error—why?
   Benham and Dunbar 103/365—8 yrs. before—but island in harbor.
   In some instances—Revere vs. Rev. Const. Co. 285/243—gross business—but not Profits!

f. Interest—Now by Court.

g. Appor. of Taxes G. L. c. 79, S. 12 amended by 634 of 1953 Query Int.?

h. Inadmissible:

1. Award or Offer.
2. Offers to buy or sell.
3. Value to owner Greenspan v. Norfolk County, 264 Mass. 9.
4. Value to taker.
5. Insurable value.
6 Amount of mortgages.
7. Forced sales.
8. Value for any particular use—but deposits of minerals, etc.
9. Rep. Cost less depreciation in service or special use properties.

Also Admissible:

Assessed Value G. L. c. 79, S. 35	Report of Comm.
App. for Abate	House No. 2738 of
Certificates of Condition of Corporations	1957. Jud. Council.*

*The Judicial Council recommended that the assessed value should not be admissible. Mr. Rosenblatt thinks it should be. F. W. G.

EMINENT DOMAIN — BILLS REFERRED TO THE JUDICIAL COUNCIL — REQUEST FOR SUGGESTIONS

In Mr. Sullivan's "Outline" reference is made to the report of the Special Commission on Eminent Domain problems which contained eight recommendations for legislation of far-reaching importance. Six bills based on this report have been referred by the legislature to the Judicial Council with request for report of its judgment on the "subject matter" of these bills. The widespread interest of these matters is indicated by the fact that the copies available at the State House are exhausted. In view of these facts we reprint the complete report (and the bills thus referred) for the information of the bench and bar and request suggestions from anyone interested for the information of the Judicial Council. All suggestions received will be submitted to the members of the Judicial Council for their consideration. Suggestions should be sent to the Editor at the headquarters of the Massachusetts Bar Association, 15 Pemberton Square, Boston 8.

FRANK W. GRINNELL, *Editor*

REPORT OF THE SPECIAL COMMISSION (UNDER RESOLVES CHAPTER 102 OF 1956) RELATIVE TO CERTAIN MATTERS PERTAINING TO THE TAKING OF LAND BY EMINENT DOMAIN. (HOUSE DOCUMENT 2738 OF 1957)

The Commission appointed under the authority of chapter 102 of the Acts of 1956 has considered the several matters referred to it. In addition, it has held hearings and consulted with various persons experienced in the law of eminent domain. Among those attending the hearings and giving their views or assisting in private consultation were judges of the Superior Court, representatives of the Attorney General's office for the Commonwealth, representatives of the United States Attorney's office for the District of Massachusetts, representatives of city and town agencies, real estate appraisers and attorneys who have represented both the taking agencies and the owners of property taken. The report that follows is the result of intensive study of all the information obtained as a result of such hearings and consultations.

The report covers three broad areas:

1. A different method for takings by eminent domain.

2. A different type of hearing authority to determine damages originally, with a right over to a jury trial.

3. Certain statutory changes in the law applicable to eminent domain proceedings.

It might be added that it is significant that after the decision was reached to provide for a different method of taking based on the

federal practice and the creation of a commission to hear land damage cases exclusively, a study of the Federal Rules for Civil Procedure (Rule 71-A) disclosed that there was a weight of authority in favor of the change. In the notes concerning that rule (Moore's Federal Practice, Vol. 7, pages 2738 through 2741) the Advisory Committee reported an investigation concerning eminent domain cases arising under the Tennessee Valley Authority, where the statute creating the Authority provides in part for the appointment of a commission to determine damages. The notes point out that of twenty-one federal judges who were interrogated concerning the commission system, seventeen gave the commission their approval and opposed the substitution of a jury system. Many of the judges went further and opposed the use of juries in any condemnation.

The committee further pointed out that in the opinion of the judges and of the committee—

1. Condemnation of large areas of land of a similiar kind involves many owners, and uniformity in awards is essential. The commission system tends to prevent discrimination and to provide for uniformity in compensation. The jury system tends to lack of uniformity. Once a reasonable and uniform standard of values for the area has been settled by a commission, litigation ends and settlements result.

2. Where large areas are involved, many small land owners reside at great distances from the place where a court sits. It is a great hardship on humble people to have to travel long distances to attend a jury trial. A commission may travel around and receive the evidence of the owner near his home.

3. It is impracticable to take juries long distances to view the premises.

4. If the cases are tried by jury, the burden on the time of the courts is excessive.

Your Commission, independent of any knowledge of the reasons behind the commission type of procedure in the TVA cases, had reached the same decision and is impressed by the wisdom of its decision when it finds confirmation of the type set forth.

Creation of an Eminent Domain Commission.

Organization.

It is recommended that there be created a seven-man commission, to have exclusive original jurisdiction of eminent domain cases. Such commission would be similar in type to the Appellate Tax Board, and the statutory provisions creating and governing such Board are an excellent precedent and guide to creating this new board.

Following the provisions of chapter 58A as a guide it is recommended—

There shall be an eminent domain commission of seven members appointed by the governor, with the advice and consent of the council. Said membership shall consist of five members of the Bar and two laymen having a particular and specialized knowledge of real estate and real estate values.

Initial appointments shall be for one, two, three, four, five, six and seven years, respectively. Thereafter reappointments shall be for a term of seven years. Members shall also be eligible for reappointment.

One member shall be designated the chairman by the Governor and Council and shall receive a salary of $15,500.

All other members shall receive a salary of $15,000.

All members shall devote their entire time during office hours to the work of the Commission.

No member shall act as attorney, counsellor or accountant before any board of assessors or before the courts of the Commonwealth, but the foregoing shall not bar a member from acting outside of office hours in any fields except those expressly prohibited.

No more than four members of the Commission shall be members of the same political party.

The principal office of the Commission shall be in Boston, but it may sit at any place within the Commonwealth.

There shall be a clerk of said Commission, appointed by said Commission, whose salary shall be $10,000, and who shall hold office for the term of seven years and may be reappointed.

There shall be such assistant clerks and clerical employees as the Commission, subject to the approval of the Governor and Council, may determine necessary.

Rules of evidence shall be strictly binding on the Commission in the conduct of its hearings, except in the case of informal procedure.

General powers of the board to incur expenses of travel, swear witnesses, issue subpoenas shall be similar to those given to the Appellate Tax Board in the various sections of chapter 58A.

PROCEDURE.

Present requirements in land damage cases have many drawbacks. From the landowner's point of view, he is faced with a deadline within which time limit he must bring a petition or lose his rights. During the pendency of the petition, he is without payment unless he goes through an involved departmental procedure to secure a *pro tanto* offer. Again, he has no accurate knowledge as to what part of his land is taken without the assistance of experts to determine the layout and the reference to his land by code numbers, as against the actual metes and bounds of the land owned by him.

From the Commonwealth's, or body politic point of view, there is a substantial monetary loss. This arises because of the fact that, unless the landowner takes action to secure a payment under the *pro tanto* procedure, the case continues until a settlement is reached or until a trial and a judgment. In either case, interest on the taxpayer's money is figured from the date of the taking. With road programs running into the millions of dollars, the interest figures represent a substantial amount of money.

The procedure used by the federal government in land takings eliminates all of the objections to the Massachusetts proceedings, and has worked remarkably well in all of the forty-eight States. It is therefore recommended that the federal procedure be substituted for the present procedure in this Commonwealth as found in chapter 79 and chapter 80A. Many of the sections in chapter 79 would not have to be stricken. Many others, however, would no longer be applicable and would have to be removed from our statute books.

The federal procedure is found in the U. S. Code and supplemented in the Federal Rules of Civil Procedure.

In the U. S. Code, Title 40, Sec. 257, the power is given to take by eminent domain. In section 258A the procedure to be followed is set forth. That procedure, in substance, requires the federal government to file a declaration of taking in the Federal District Court containing—

1. The statement of the authority under which and the public use for which said lands are taken.

2. A description of the lands taken sufficient for identification.

3. A statement of the estate or interest in said lands taken.

4. A plan showing the lands taken.

5. A statement of the sum of money estimated to be "just compensation."

The section then goes on to state that upon the filing of the declaration and the deposit in court for the use of the persons entitled thereto of the amount of the estimated compensation, title to said lands shall vest in the United States of America, and the right to compensation for the taking shall vest in the person entitled thereto.

The section further authorizes the interested party to draw down without prejudice the money on deposit and still have his trial as to whether he is entitled to more money.

Meanwhile, no interest runs on the money that is on deposit in the court, since it is available to the landowner the moment he wants to take it.

The adoption of the federal procedure in this State would give the taxpayer immediate access to money with which he could acquire

other property while he contested the valuation placed on the property by the appraisers. He would have no problem in determining what is taken, and he would face no deadline.

The Commonwealth, or body politic, on the other hand, would not be chargeable with one cent of interest on the moneys deposited into court.

The federal type of petition should be filed by the taking authority with the eminent domain commission. The filing of such petition and the paying into court of the appraised value of the property would constitute such a taking. Thereafter, the landowner need take no steps to protect his rights unless he wanted to contest the valuation.

If the valuation is contested, the landowner should be required to file an appearance or answer in the case, with an entry fee as hereinafter set forth. A failure to so file should be subject to permission of the Commission to permit a late filing, provided that the case has not been adjudicated.

The Commission, by rule and regulation, should establish a procedure requiring all cases to be discussed with a commissioner at an informal hearing in the nature of a pre-trial to see if the parties could adjust their differences. If the case was not settled within a specified time after the informal hearing, the case should then go on the list for a hearing on the merits.

In all cases where the damages claimed by the property owner in his answer are under $25,000, the hearing on the merits should be before a single commissioner.

In all other cases, a hearing shall be held before three members of the Commission.

There should be an informal procedure type of hearing available similar to that set forth in chapter 58A, section 7A, the conduct of which shall be governed by rules and regulations established by the Commission.

Such an informal procedure hearing, under the guidance of experienced commissioners, would be of value in securing justice between the parties without limiting the case to the very strict rules that frequently result in a property owner not being able to present a full and fair picture of value at the trial.

Following a hearing on the merits and a decision by the board similar to that of the Appellate Tax Board, chapter 58A, section 13, the parties should be notified. If neither side has requested a stenographic report of the proceedings, that should constitute a waiver of any right of appeal to the Supreme Judicial Court, similar to chapter 58A, section 10.

There should be a provision in the statute that the taking authority, by its exercise of the right of eminent domain, rather than negotiating a purchase with the owner, waives any right to a jury trial upon the filing of a petition for a taking with an eminent do-

main board. That would leave only the landowner with any right to a jury trial if one does exist.

Following notice of the decision, the landowner should have thirty days within which to file a notice of his insistence on a jury trial with the eminent domain commission. With that notice, he should file a fee in accordance with the usual entry fees for the Superior Court.

Upon the claiming of a jury trial and the payment of the entry fee, the eminent domain board shall forthwith prepare a record for transmittal to the Superior Court. Such a record would contain the petition filed by the taking authority, the answer filed by the landowner, and the written decision of the board determining the amount of damage. The decision of the board would be evidence of the value of the property and would be admissible in evidence as a document for the jury to consider.

After the record was filed in the Superior Court, the case would have priority over other matters, similar to present land damage petitions, and in all respects would be governed by the present procedure relative to such cases in the Superior Court.

If either side wanted an appeal to the Supreme Judicial Court on questions of law, the appeal should be filed in the manner similar to that set forth relative to the Appellate Tax Board in chapter 58A, section 13. By following that statute, the right would clearly be open to have questions of law reviewed under established procedure.

Fees and Costs of the New Commission.

The creation of such a commission automatically raises the problem of increased cost of state government. The Commonwealth, or body politic, of course, benefits by the removal of such cases from the Superior Court, and the assistance that such removal gives to the clearing of the congestion now existing in the Superior Court. The cost of such a commission would not exceed $200,000 per year. A scheduled of fees similar to those set forth in section 7 of chapter 58A relative to the Appellate Tax Board of the Commonwealth ought to go a long way towards making the new commission self-supporting. In fact, the Appellate Tax Board, on its present schedule of fees, provides 55 per cent of the revenue needed for its operation.

Under present procedure, a landowner whose property has been taken has to bring a petition that costs him $5 for an entry fee and a minimum of $6 for service on the taking authority. Those charges have not been changed materially in recent years and do not reflect increased costs. It is therefore proposed that when a landowner files his appearance or answer with the commissioner, it be filed in a form established by the commissioner and set forth the valuation that the landowner placed on the property.

In all cases there should be a minimum fee of $5 and, on valuations over $25,000, the landowner should pay a fee of 20 cents for

each thousand dollars of valuation. Such valuation shall not be evidence or an admission by the landowner, and he shall be subject at the termination of the proceedings to paying any additional entry fee as costs if his recovery is in excess of the valuation he originally placed with the board. This latter provision is necessary to prevent a person from placing a low valuation on the property for the purpose of securing a lower entry fee.

Since the Appellate Tax Board has an entry fee of $5 on the property valued up to $50,000, whereas we have an entry fee of $5 on property valued up to $25,000, and the Appellate Tax Board has 15 cents on each thousand dollars of assessed value where the property is worth more than $50,000 as against our 20 cents on each thousand dollars, this Commission ought to do much better than the Appellate Tax Board method of being 55 per cent self-supporting.

It should be noted that this schedule of fees will not result in a hardship on a home owner. As an example, a $50,000 case now costs $5 for entry and $6 for service, for a total of $11. Under the proposed fee schedule, the property owner would pay 20 cents for fifty units of $1,000 each, or $10.

In addition to the actual income of the board, the new procedure would result in a tremendous saving on interest charges that the Commonwealth or body politic now pays on every taking because of its failure to have authority to pay money into court.

In addition to that saving there is a saving of $700 per day for each day of jury trial that the eminent domain commission eliminates.

Finally, experience has shown that a jury trial usually does not materially increase the amount available to the property owner had he accepted a settlement. In many instances, the actual increase over the offer is so small as to make the jury cost almost unconscionable.

In addition, the uniformity of decisions that would be reached by the Commission would eliminate the guesswork as to what a particular jury might do; and, after the trial of the first case or two before the Commission in a given area, other takings similar in kind would undoubtedly be settled on the basis of the valuations set in the cases that were tried.

Therefore, when all the factors are taken together, a new commission would not only be more efficient, but would result in an actual cash saving to the Commonwealth.

RECOMMENDED STATUTORY CHANGES.

The following statutory changes are recommended:

1. Strike out the admissibility of the assessed value in land damage cases.

Reasons:

The only basis on which assessed values ought to be admitted in evidence is that they would have evidenciary weight in reaching a

determination of value. In fact, there are so many variables in assessed valuations that they have no such weight. For example:

(*a*) Some cities, such as Boston, greatly overvalue.

(*b*) Other cities and towns, for the purpose of attracting new industry, greatly undervalue.

(*c*) Some of the growing towns appear to have two standards: for new residence construction, at a higher rate than the other for the older inhabitants who are assessed at a lower rate, at least until a sale takes place.

(*d*) Both petitioners and the Commonwealth appraisers uniformly fail to set a value that is comparable to the assessed value. In almost every instance both valuations are higher.

(*e*) Assessing depends on the approach of the particular city or town. Some believe in setting a low tax rate with high valuations, while others set a higher tax rate with lower valuations. In both instances, the same amount of revenue is raised.

It is for these reasons and the fact that assessments are actually for the purpose of raising money rather than setting true valuations that it is recommended that the statute be repealed.

It is also interesting to note that the Judicial Council has recommended its repeal.

2. Strike out the admissibility of applications for abatement.

Reasons:

(*a*) The applicant reasonably expects that he will not get an abatement at the figure he fixes. Therefore, he sets his base lower to allow a spread and get a valuation somewhere between his low and the assessors' high.

(*b*) Some hard-pressed cities deliberately raise assessments each year, knowing that there will be abatement applications, but for the time being they have taken care of the tax rate. The property owner is then forced to file an application to get his assessment down where it belongs, and he sets the figure lower for the reasons set forth above.

(*c*) In many instances, the application for abatement is denied completely, which shows that his valuation, in the opinion of the experts on the Appellate Tax Board, was a false one, yet such an application is admissible.

(*d*) As a matter of law, a statement of value is not required in the abatement application, even though the form contains such a space. The well-informed owner does not state a value and therefore cannot be harmed by having such a statement admitted against him, thus giving us two standards, depending upon the wisdom of the applicant.

(*e*) The prospects of a taking following publicity depreciate value and compel an owner to file an abatement application, thus putting

him in the position of committing himself to a value without the benefit of an expert.

3. Add a statute giving the legal department having to defend the land damage petition the right to reject contract appraisers for just cause and the further right in such cases to hire appraisers of its own and charge the same back to the expense of the taking agency.

Reason:

There are many instances where incompetent appraisers or competent men who make poor witnesses are selected by the taking authority. Without the power given by this change the legal department has to use men it would not otherwise have as witnesses, and it reacts to the detriment of the taxpayer, who has to pay for the taking.

4. Add a statute that interest shall be due and payable at the regular rate on any settlement or judgment up until the actual date of the issuance of the check.

Reason:

At present there is an unconscionable delay of eight weeks between the time a case is settled or a judgment issued and the time it is paid. The only way to cut departmental red tape is to hold the taking authority responsible for the interest that the property owner loses by not being paid promptly.

5. Add a statute providing for the following:

(*a*) That in cases where the landowner can show a vote by the taking authority of its probable intention to take his property, the landowner shall have the right to introduce evidence and have his value fixed as of the period immediately preceding such vote concerning the proposed taking.

(The Commission considered providing for the inclusion, as an element of damage, the net provable income lost in the period between such vote and the date of actual taking, but the majority were of the opinion that no practicable provision could be made therefore without opening the door to speculative damages.)

Reason:

Property is now valued as of the date of taking, yet there is frequently a long period of publicity before a taking. As a result, tenants move and value of the property decreases solely because of the threatened taking. It is a loss that the property owner suffers because of the taking, and he ought to be able to fix his value in its true sense before the unfavorable publicity arose, and he also ought to be compensated for the loss of income due to vacancies between the time of the publicity and the actual taking. Neither is compensable at the present time.

6. Add a statute that the taking authority shall place a duplicate complete file in the hands of the legal department handling the taking as soon as reasonably possible after the taking, but no later than the time of filing of the petition.

Reason:

In many instances the legal departments having to defend petitions for land damages are hampered and delayed through a failure to secure a complete file with which to negotiate a settlement or prepare for trial.

7. Add a statute that the taking authority or its counsel may not settle any eminent domain case for more than 20 per cent above its final appraisal or panel figure, where there is such a figure, without appearing before a single member of the eminent domain commission and securing his approval on the presentation of evidence that the settlement is a proper one.

There should be a further provision that this shall not apply to takings under existing bond issues, but will apply to all new bond issues, in which it shall be specifically stated that the new procedure is the one to be followed.

Reason:

The Superior Court has expressed its reluctance to review settlements of cases on the ground that it adds to the burden of the court, that there is not sufficient time to weigh the evidence, and that the judges are not properly qualified to pass upon the evidence of value.

8. Add a statute providing a means for the Department of Public Works acquiring a temporary easement in land for the purpose of making preliminary surveys, soundings, drillings and examinations upon such land (exclusive of buildings).

Reason:

The Department of Public Works has occasionally had difficulty in obtaining permission to enter upon private land for the purpose of making preliminary surveys. At the present time there is no provision in the law giving the Department this very necessary right. Of course any such right should be subject to the payment of damages for injury caused by any such action by the Department.

Submitted herewith, in Appendices A through H, will be found the drafts of legislation necessary to carry into effect the recommendations made in this report by this Commission.

Respectfully submitted,

SEN. RALPH V. CLAMPIT,
Chairman.

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JOHN M. BARNES
ALEXANDER S. BEAL
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NOTE.

The Commission desires to acknowledge with thanks the time, advice and assistance given to it by the following:

Chief Justice Paul C. Reardon and Justice Eugene A. Hudson of the Superior Court.

United States Attorney Anthony Julian and Assistant United States Attorney Arthur H. Bloomberg.

Attorney General George Fingold and Assistant Attorney General Max Rosenblatt.

Commissioner Carl A. Sheridan and officials of the Department of Public Works of the Commonwealth of Massachusetts.

Chairman William F. Callahan and representatives of the Massachusetts Turnpike Authority.

John Conley, Esq., Attorney for the Boston Housing Authority.

Edward B. Hanify, Esq.

George A. McLaughlin, Esq.

Arthur V. Sullivan, Esq.

J. Burke Sullivan, Esq.

James F. Pafford, President, Massachusetts Board of Real Estate Appraisers.

Appraisers James Alpern, Louis H. Donovan and Ralph Murray.

PROPOSED LEGISLATION.

APPENDIX A.

AN ACT CREATING AN EMINENT DOMAIN BOARD.

The General Laws are hereby amended by inserting after chapter 79 the following new chapter: —

CHAPTER 79A.

EMINENT DOMAIN BOARD.

Section 1. There shall be in the department of the attorney general, but in no manner subject to the control of the said department, an eminent domain board, in this chapter referred to as the board, consisting of seven members and a clerk appointed by the governor, with the advice and consent of the council, five of whom and the clerk shall be members of the bar, and two laymen having a particular and specialized knowledge of real estate and real estate values, which members shall be designated in their initial appointments to serve, respectively, for one, two, three, four, five, six and seven years from March first in the year of appointment. The governor, with the advice and consent of the council, shall designate one of the members as chairman. Upon the expiration of the term of office of a member, his successor shall be appointed in the manner aforesaid for seven years. The clerk shall be appointed for a term of seven years. The chairman of said board shall receive a salary of fifteen thousand five hundred dollars, and each other member shall receive a salary of fifteen thousand dollars. The clerk shall receive a salary of ten thousand dollars. All members of the board and the clerk shall devote their whole time in office hours to the work of the board. No member of the board shall, while he remains a member, act as attorney, counsellor or accountant in any contested matter of eminent domain before any department of the commonwealth or a political subdivision thereof, or before the courts of the commonwealth; but the foregoing shall not be construed to prevent a member of the board from acting outside of office hours of the board as attorney, counsellor or accountant in any matters other than those dealing with eminent domain proceedings by the commonwealth or by a subdivision thereof. Not more than four members of the board shall be members of the same political party. The majority of the members

of the board shall constitute a quorum for the transaction of its business, except that a single member shall hear matters where the value of the property does not exceed twenty-five thousand dollars, and in all other cases the hearing shall be held before three members of the board. A vacancy in the board shall not impair its powers nor affect its duties. The board shall have a seal which shall be judicially noticed.

Section 2. The principal office of the board shall be in Boston, but it may sit at any place within the commonwealth. The time and place of its meetings shall be prescribed by the chairman. The county commissioners shall provide the board with suitable rooms in courthouses or other buildings when necessary for hearings outside the city of Boston. Adequate offices and a hearing room in the state house or elsewhere in said city shall be provided for the board.

Section 3. The board shall provide for the publication and sale or distribution of such of its reports and opinions as are of public interest, in such form and manner as it may deem best adapted for public convenience and use, upon such terms and conditions as may be approved by the governor and council.

Section 4. The board shall make to the general court an annual report containing such suggestions and recommendations for the amendment, alteration and modification of existing laws relative to eminent domain and related matters, as it may deem desirable, and shall include in such report a statement of the number and type of matters handled by it during the preceding state fiscal year and the number of matters pending at the end of the year.

Section 5. The members and employees of the board shall receive their necessary traveling expenses, and their expenses actually incurred for subsistence while traveling outside the city of Boston in the performance of their duties. The board, subject to the approval of the governor and council, may appoint such employees, including assistant clerks, and fix their salaries, and make such expenditures, including expenditures for law books and publications, as may be necessary in order to execute efficiently the functions vested in said board. The assistant clerks and other employees appointed by the board shall hold office during good behavior, but subject, however, to retirement under the provisions of any applicable general or special law relative to retirement systems. All expenditures of the board shall be allowed and paid out of moneys appropriated for the purposes of the board, upon presentation of itemized vouchers therefor, signed by the chairman or a person designated by the board for the purpose.

Section 6. No real estate shall be taken for public use by the formal vote of any board of officers under chapter seventy-nine or chapter eighty A of the General Laws, and no damages shall be assessed for the taking or seizure of property for a public purpose or for injury thereto by authority of law under said chapter seventy-nine or chapter eighty A unless such proceedings are commenced

under this chapter, notwithstanding any general or special act hitherto enacted, and all provisions of chapter seventy-nine and chapter eighty A which are inconsistent with the provisions contained in this chapter are hereby repealed.

The board shall have exclusive original jurisdiction to determine the amount and make an award of damages in all takings of real estate under chapter seventy-nine and chapter eighty A.

Section 7. Upon application to the board by the taking authority the board shall cause to be filed a copy of the notice of the taking in the registry of deeds where the land is located. The original notice shall remain on file with the board, and another copy of the notice shall be sent to the owner or owners of the land by certified mail, return receipt requested. The delivery of the notice shall have the same effect as the delivery and service of a summons.

Each notice shall contain a statement of the authority under which, and the public use for which, said lands are taken, a description of the lands taken sufficient for identification, a statement of the estate or interest in said lands taken, and the name of the owner or owners of said estate or interest, a plan showing the lands taken, and a statement of the sum of money estimated by the board to be just compensation for the taking.

The owner or owners of the lands so taken shall file an answer within twenty days after service of the notice, and the failure to file an answer within the time allowed shall constitute a consent to the taking and to the authority of the board to proceed to hear the action and to fix the compensation. However, the board may, upon motion of the owner, allow the filing of a late answer for good cause shown.

Section 8. The board shall deposit and set aside for the use of the owner or owners such sum or sums of money which it estimated to be just compensation in its notice, at which time title to said lands shall vest in the taking authority, and the right to compensation shall vest in the person entitled thereto.

However, no interest shall be paid on any sum or sums so set aside, and the person entitled thereto may take the payment of it without prejudice to his rights of further hearings, trial and other remedies afforded him under this chapter if he is of the opinion that he is entitled to more compensation than the sum set aside for him.

In the event of further hearings, or trial, if the owner shall recover any sums over and above the original amount set aside for him, then interest at the rate of six per centum per annum shall be paid on such sum from the date of final judgment until the check in payment thereof is issued.

However, if the owner recovers a judgment which is less than the sum set aside for him by the board, then he shall be ordered by proper decree of the board to refund to the taking authority an amount equal to the difference between the payment already received

by or set aside for him and the final judgment rendered, plus costs and interest at the rate of four per centum per annum from the date as of which damages were assessed.

Section 9. If a landowner files an answer with the board, it shall be accompanied by a filing fee of five dollars. The answer shall be in the form established by the board and shall set forth the valuation which the landowner places on his property. On valuations by the owner in excess of twenty-five thousand dollars he shall pay a fee of twenty cents for each additional thousand dollars of valuation.

Such valuation by the owner in his answer shall not constitute evidence nor an admission, and he shall be assessed an additional entry fee as costs, if his recovery is in excess of the valuation he originally stated in his answer.

Section 10. A formal hearing shall be granted if the owner so requests, or, by direction of the board, any matter pending before it may be set down for a formal hearing.

All cases where the valuation stated by the landowner in his answer is twenty-five thousand dollars or less shall be heard by a single member. All other cases shall be heard by three members.

Hearings before the board or members of the board shall be open to the public, and such hearings and all proceedings shall be conducted in accordance with the rules of evidence now in force in the courts of the commonwealth.

Section 11. The board shall establish by rule an alternative procedure, hereinafter referred to as the informal procedure for the assessment of damages in eminent domain proceedings, where such procedure is elected by the landowner, and the decision of the board shall be final.

Such procedure, to the extent that the board may consider practicable, shall eliminate formal rules of practice, pleading and evidence, and, except for the entry fee hereinbefore provided, may eliminate any or all fees and costs, or may provide that costs shall be in the discretion of the board.

The chairman shall provide for a speedy hearing of all matters to be heard under the informal procedure.

Section 12. At the request of any party made before any evidence is offered, the board shall order that all proceedings in a pending appeal be officially reported by a stenographer. The board may contract for the reporting of such proceedings at the expense of the commonwealth in the first instance, but shall collect the cost thereof from the persons requesting that the proceedings be reported. In such contract the board may provide that one or more copies of the transcript be supplied to the board without cost to the commonwealth, and may fix the terms and conditions upon which transcripts will be supplied to other persons and agencies by the stenographer. No proceedings shall be reported officially until an amount equal to the cost thereof, as estimated by the clerk, shall have been deposited with him at such times and in such manner as may be provided by

the rules of the board. Any excess deposit over the actual cost shall be returned to the depositor by the clerk. If no party requests that the proceedings be reported, all parties shall be deemed to have waived all rights of appeal to the supreme judicial court upon questions as to the admission or exclusion of evidence, or as to whether a finding was warranted by the evidence. The right of appeal upon questions of law raised by the pleadings or by an agreed statement of facts, or shown by the report of the board, shall not be deemed to be waived. For its own information only, the board shall have stenographic notes of hearings taken and may have transcripts thereof prepared in proceedings which are not officially reported at the request of a party.

Section 13. The board shall make a decision in each case heard by it and may make findings of fact and report thereon in writing. Except in cases heard under the informal procedure authorized by section eleven, the board shall make such findings and report thereon if so requested by either party within ten days of a decision without findings of fact. Such report may, in the discretion of the board, contain an opinion in writing, in addition to the findings and opinions of the board, and all evidence received by the board, including a transcript of any official report of the proceedings, shall be open to the inspection of the public; except that the originals of books, documents, records, models, diagrams and other exhibits introduced in evidence before the board may be withdrawn from the custody of the board in such manner and upon such terms as the board may in its discretion prescribe.

Notwithstanding the decision of the board, the landowner shall have a right to trial by jury in the superior court by filing a written claim for such jury trial within thirty days after the date of the decision of the board, together with a filing fee of five dollars.

Upon receiving such jury claim, the clerk of the board shall transmit to the clerk of the superior court of the county in which the land lies the record of its proceedings which shall include copies of the following: — all of the pleadings filed with the board, the report and findings of the board including any opinions filed, together with the claim for jury trial. The report and findings of the board shall be admissable in evidence.

The clerk of the superior court shall upon receipt of such record place the matter upon the list of cases advanced for speedy trial.

Section 14. If the right to appeal to the supreme judicial court has not been waived under section twelve, an appeal to said court upon questions of law raised by the pleadings, admission or exclusion of evidence, as to whether a finding was warranted by the evidence, or by an agreed statement of facts, or as shown by a report of the board, may be taken by either party.

Each claim of appeal shall set out separately and particularly each error of law asserted to have been made by the board. The procedure to be followed, including the printing of the record, shall be that pro-

vided in the second paragraph of section on hundred and thirty-five of chapter two hundred and thirty-one for carrying questions of law to the full court.

Section 15. The mailing by certified mail, postage prepaid, to the address of any of the parties, or to the address of his attorney or agent of record, if any, or to the usual place of business of the board, shall be deemed sufficient service of any pleading, motion, order, notice or process so served in respect to proceedings before the board. The board may order that further notice be given in any case.

Section 16. Any member of the board, or any employee of the board designated in writing for the purpose by the chairman, may administer oaths, and any member of the board may summon and examine witnesses and require, by subpoena signed by the member, the production of all returns, books, papers, documents, correspondence and other evidence, pertinent to the matter under inquiry, at any designated place of hearing, and may require the taking of a deposition before any person competent to administer oaths, either within or without the commonwealth. In the case of a deposition, the testimony shall be reduced to writing by the person taking the deposition or under his direction, and shall then be subscribed by the deponent.

Either party may summon witnesses or may require the production of papers in the same manner in which witnesses may be summoned, and papers may be required to be produced for the purpose of trials in the courts. Any witness summoned or whose deposition is taken shall receive the same fees and mileage as witnesses in the courts.

Section 17. Witness fees and expenses of service of process may be taxed as costs against the unsuccessful party to the appeal, in the discretion of the board. In the event that the commonwealth, or any official thereof, is the unsuccessful party to an appeal, the costs shall be paid from the state treasury upon certificate of a member of the board in such form as the board may prescribe by regulation. In the event that a subdivision of the commonwealth, or any official thereof, is the unsuccessful party to an appeal, the costs shall be paid from the treasury of such subdivision by the treasurer thereof upon certificate of a member of the board in such form as the board may prescribe by regulation. In the event that costs are taxed against an unsuccessful landowner, a member of the board shall certify the amount of the same, and they may be recovered in an action of contract by the state treasurer in the case of eminent domain proceedings brought by the commonwealth, or by the treasurer of the subdivision of the commonwealth in the case of eminent domain proceedings brought by a political subdivision of the commonwealth.

APPENDIX B.

AN ACT PROVIDING FOR THE ADMISSIBILITY OF CERTAIN EVIDENCE IN EMINENT DOMAIN PROCEEDINGS RELATIVE TO PUBLICITY.

Chapter 79 of the General Laws is hereby amended by striking out section 12, as most recently amended by section 1 of chapter 634 of the acts of 1953, and inserting in place thereof the following section: —

Section 12. The damages for property taken under this chapter shall be fixed at the value thereof before the taking, except that a landowner may introduce evidence to show a vote of the taking authority indicating its probable intention to take his property, in which event he may in the discretion of the court or of a member or members of the eminent domain board, as the case may be, have the right to have the value fixed as of the period immediately preceding such vote concerning the proposed taking, and also the net provable income lost in the period between such vote and the date of the actual taking, and in case only part of a parcel of land is taken there shall be included damages for all injury to the part not taken caused by the taking or by the public improvement for which the taking is made; and there shall be deducted the benefit accruing to the part not taken unless it was stated in the order of taking that betterments were to be assessed. In determining the damages to a parcel of land injured when no part of it has been taken, regard shall be had only to such injury as is special and peculiar to such parcel, and there shall be deducted the benefit accruing to such parcel, unless it was stated in the order of taking, or if there was no taking in the order for the establishment, construction, alteration, repair or discontinuance of the public improvement which caused the injury, that betterments were to be assessed. Whenever the title or interest taken is such that the property will be exmpt from taxation so long as it is held and used for the purposes for which it is taken, the damages for the taking shall include an amount separately determined and stated which shall be estimated to be equal to that portion of the tax assessed upon the property in the year it is taken which, if the tax were apportioned pro rata according to the number of days in such year, would be allocable to the days ensuing after the taking.

APPENDIX C.

AN ACT PROVIDING FOR THE REJECTION OF CERTAIN APPRAISERS BY LEGAL DEPARTMENTS REQUIRED TO DEFEND EMINENT DOMAIN PROCEEDINGS.

Chapter 79 of the General Laws is hereby amended by inserting after section 14 the following section: —

Section 14A. The legal department of any agency required to defend a petition filed for the assessment of damages for the taking of real estate may for just cause reject the services of a contract

appraiser employed by the taking authority and may employ an appraiser of its own choosing and charge the expenses thereof to the taking authority.

APPENDIX D.

AN ACT REQUIRING A TAKING AUTHORITY TO FURNISH A COMPLETE DUPLICATE FILE OF TAKINGS BY EMINENT DOMAIN TO CERTAIN LEGAL DEPARTMENTS.

Chapter 79 of the General Laws is hereby amended by inserting after section 16 the following section: —

Section 16A. The taking authority shall furnish to the legal department handling the taking as soon as reasonably possible a duplicate complete file of the proceedings of such taking, but in no event shall such file be furnished later than fourteen days after a petition for the assessment of damages under section fourteen has been filed.

APPENDIX E.

AN ACT RELATIVE TO THE ADMISSIBILITY OF CERTAIN EVIDENCE PERTAINING TO VALUE IN THE TRIAL OF EMINENT DOMAIN CASES.

Chapter 79 of the General Laws is hereby amended by striking out section 35, as appearing in the Tercentenary Edition, and inserting in place thereof the following section: —

Section 35. The valuation made by the assessors of a city or town for the purpose of taxation or statements in an application for abatement of taxes signed by a petitioner shall not be admissible as evidence of the fair market value of the real estate by any party to a suit for the taking of or injury to real estate by the commonwealth or any political subdivision thereof under authority of law.

APPENDIX F.

AN ACT RELATIVE TO THE PAYMENT OF INTEREST IN EMINENT DOMAIN PROCEEDINGS.

Chapter 79 of the General Laws is hereby amended by striking out section 37, as most recently amended by chapter 641 of the acts of 1956, and inserting in place thereof the following section: —

Section 37. Damages under this chapter shall bear interest at the rate of four per cent per annum from the date as of which they are assessed until paid, except as herein otherwise provided, and such interest shall in a case tried by jury be computed by the court and added to the jury's verdict; but an award shall not bear interest after it is payable unless the body politic or corporate liable therefor fails upon demand to pay the same to the person entitled thereto; provided, that in any case where a settlement has been made or judgment has been entered additional interest at the rate of six per cent shall be paid by the taking authority from the date of such settlement or judgment until the check in payment thereof is issued.

APPENDIX G.

AN ACT RELATIVE TO THE SETTLEMENT FOR PROPERTY TAKEN BY EMINENT DOMAIN.

Chapter 79 of the General Laws is hereby amended by inserting after section 39 the following section:—

Section 39A. No settlement for property taken by eminent domain shall be made by the taking authority, or the legal department representing such authority, for an amount in excess of twenty per cent above a final appraisal or panel figure, if any, without the approval of a justice of the superior court or a member of the eminent domain board, as the case may be.

APPENDIX H.

AN ACT AUTHORIZING AGENTS AND EMPLOYEES OF THE DEPARTMENT OF PUBLIC WORKS TO ENTER UPON PRIVATE PROPERTY FOR THE PURPOSE OF MAKING SURVEYS, SOUNDINGS AND DRILLINGS.

Chapter 81 of the General Laws is hereby amended by inserting after section 7E the following section:—

Section 7F. Whenever the department deems it necessary to make surveys, soundings, drillings or examinations to obtain information for, or to expedite, the construction of state highways or other projects under its jurisdiction, and whenever any person denies the department, its authorized agents or employees, permission to enter upon private land, not including buildings, for such purposes, the department may take by eminent domain such rights in land as may be necessary for such purposes. Any person whose property has been taken or injured by any action of said department under authority of this section may recover damages therefor as he may be entitled thereto.

BILLS REFERRED TO THE JUDICIAL COUNCIL WITH REQUESTS FOR REPORTS

Referred by Resolves Chapter 120 (July 10, 1957).

HOUSE—No. 3096.

AN ACT PROVIDING FOR THE REJECTION OF CERTAIN APPRAISERS BY LEGAL DEPARTMENTS REQUIRED TO DEFEND EMINENT DOMAIN PROCEEDINGS. [BASED ON REPORT APPENDIX C.]

Whereas, The deferred operation of this act would tend to defeat its purpose which is in part to facilitate and expedite the procedures entailed in eminent domain proceedings and insure adequate and just compensation for damages arising out of such proceedings, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Chapter 79 of the General Laws is hereby amended by inserting after section 14 the following section:—

Section 14A. The legal department of any agency required to defend a petition filed for the assessment of damages for the taking of real estate may for just cause reject the services of a contract appraiser employed by the taking authority and may employ an appraiser of its own choosing and charge the expenses thereof to the taking authority.

HOUSE—No. 3097.

AN ACT REQUIRING A TAKING AUTHORITY TO FURNISH A COMPLETE DUPLICATE FILE OF TAKINGS BY EMINENT DOMAIN TO CERTAIN LEGAL DEPARTMENTS. [BASED ON REPORT APPENDIX D.]

Whereas, The deferred operation of this act would tend to defeat its purpose which is in part to facilitate and expedite the procedures entailed in eminent domain proceedings and insure adequate and just compensation for damages arising out of such proceedings, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Chapter 79 of the General Laws is hereby amended by inserting after section 16 the following section:—

Section 16A. The taking authority shall furnish to the legal department handling the taking as soon as reasonably possible a duplicate complete file of the proceedings of such taking, but in no event shall such file be furnished later than fourteen days after a petition for the assessment of damages under section fourteen has been filed.

HOUSE—No. 3099.

AN ACT RELATIVE TO THE PAYMENT OF INTEREST IN EMINENT DOMAIN PROCEEDINGS. [BASED ON REPORT APPENDIX F.]

Whereas, The deferred operation of this act would tend to defeat its purpose which is in part to facilitate and expedite the procedures entailed in eminent domain proceedings and insure adequate and just compensation for damages arising out of such proceedings, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 79 of the General Laws is hereby amended by striking out section 37, as most recently amended by chapter 641 of the acts of 1956, and inserting in place thereof the following section:—

Section 37. Damages under this chapter shall bear interest at the rate of four per cent per annum from the date as of which they are assessed until paid, except as herein otherwise provided, and such interest shall in a case tried by jury be computed by the court and added to the jury's verdict; but an award shall not bear interest after it is payable unless the body politic or corporate liable therefor fails upon demand to pay the same to the person entitled

thereto; provided, that in any case where a settlement has been made or judgment has been entered additional interest at the rate of six per cent shall be paid by the taking authority from the date of such settlement or judgment until the check in payment thereof is issued.

Referred by Resolves Chapter 129 (July 19, 1957).

Appendix A, Appendix B and Appendix G, of the Report as described in said chapter 129 as follows:

RESOLVED, That the judicial council be requested to investigate the subject matter of current house document numbered 2738, Appendix A, relative to creating an eminent domain board; Appendix B, relative to providing for the admissibility of certain evidence in eminent domain proceedings relative to publicity; and Appendix G, relative to the settlement for property taken by eminent domain, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

THE RECENT CIVIL RIGHTS CASES — BALANCED THINKING NEEDED — AN INTERVIEW WITH ERWIN N. GRISWOLD

We have quoted before—and it can never be repeated too often—the remark of the late Professor Andrew C. Mclaughlin in his volume of lectures on "American Constitutionalism" that "the justification of popular government is the willingness of people to think." This means balanced thinking for balance is not only a universal law but it is the basis of our constitutional government and particularly of the administration of justice as illustrated by the well-known symbol—the scales of justice. As Edmund Burke said in his famous reply to his constituents—the electors of Bristol—in the 1770's, "Government is a matter of judgment."

It is for this reason that we reprint, by permission, the interview with Dean Griswold by Mr. William E. Mullins from *The Boston Herald* of June 28, 1957.

F. W. G.

THE INTERVIEW

GRISWOLD CALMS FEARS, SAYS COURT FOLLOWS U. S. TRADITION

By W. E. MULLINS

Erwin N. Griswold, dean of the Harvard Law School, is not alarmed at the commotion incited by the recent decisions of the Supreme Court. His views are comforting to those who foresee danger to the safety of the Republic in the controversial rulings. In fact, he has found nothing very startling in the texts.

After a reading of the several opinions and discussions of their import with his associates, he has concluded that none of them represents any real change of direction in the court. He is particularly impatient with what he regards as a distortion in interpretations he has observed of the Jencks reversal giving defendants limited access to files of the Federal Bureau of Investigation.

"The reactions to the Jencks decision," the distinguished authority of the law said, "have been unduly emotional and not the result of careful thinking. There is absolutely nothing in the opinion giving the public access to the secret files of the FBI. It simply blueprints procedures used right here in Boston and in every criminal court.

"Analysis has revealed that the court simply said that if the FBI in prosecuting a case uses a witness for the state, any written statements made by this witness prior to trial must be made available to the defense to the end that an intelligent cross-examination might be made.

Traditional Way

"The FBI need not expose the identity of any secret informer. It applies only to witnesses placed on the stand and once they are on the stand they certainly are identified. It is traditional in our courts that prior statements are used to expose inconsistencies and to seek to impeach the veracity of these statements. Information obtained from secret informers still is protected.

"It should be impressed that it applies only to prior statements made by witnesses. It does not involve informants who do not testify.

"Analysis of the Watkins case shows that the issue of civil liberties is not involved. The issue is separation of powers. The court said the legislature is the legislature and is free to legislate and to investigate anything connected with legislation. It is not free to rove around the country. The court simply staked out the limitations of this function.

Not Novel

"By the way, there was nothing novel about this ruling. There were 19th century cases like it. It will not hamstring Congress as a legislative agency but it hopes to hamstring Congress as a punitive agency. Many members of Congress do not desire to participate in these high-flying ventures, ending up on television. There is no interference with the function to make laws.

"Justice Black has been criticized and comparisons have been made with his views now and those he held 25 years ago as a member of the U. S. Senate in which he was a rabid investigator. He then thought as a senator. Now he thinks as a justice. He is giving more thought to civil rights and I think he is nearer right now.

"I might say that I strongly disagree with David Lawrence's suggestion that the justices be elected. That would be most unfortunate. Judges must be free of politics.

Unfair to Becks

"There is one consideration. The Watkins decision may tend to restrict the McClellan investigation, although I must assert it has been conducted better than some of its predecessors. It has not been particularly fair to Beck or to his son. They are entitled to have both sides explained.

"It is essential to be calm. We must remember that the elder Beck has been indicted. Once he was indicted the investigation should have been suspended until his trial was concluded. An atmosphere of hostility has been created. Remember the decision here in the Delaney case? The circuit court held his interests had been prejudiced by a congressional investigating committee and he was granted a new trial.

"The Sweezy case is interesting. This man was simply lecturing at a college. I submit, it seems to be stretching things to be greatly exercised at the prospect of internal threat to the security in New Hampshire. It showed a lack of perspective. It did not constitute an external threat.

Not Conspirators

"Aside from these decisions I confess that I am puzzled at the inability or the unwillingness to see the difference between, for example, liberals like Paul Hoffman and Robert Hutchins on one side and dedicated Communists like Eugene Dennis and William Z. Foster on the other side.

"Now, Hoffman and Hutchins might be wrong. Certainly, they are not conspirators against the Republic. No doubt there are subversives in the country who constitute a serious threat and they should be prosecuted by the FBI and other government agencies, but we should not take off after the liberal-minded. They may be wrong but they do not conspire and that is the point.

"It is my broad view that these decisions have given us a new balance wheel. The court simply decided cases before it in what I choose to regard as the good old American track that regards independence and liberty and tradition as precious. There has been no impairment of necessary governmental power to protect against actual threat.

"I have a high regard for the new justices. Examine the background of Justice Harlan and you find he is a solid Wall Street lawyer and nothing he has done has altered that appraisal.

One Regret

"As for Justice Brennan, I am pleased but not surprised at the positions he has taken. He was a student in our law school and I might say there is no more serious, no more honest or no more courageous member on the bench than he. He is not brilliant like Holmes and Brandeis, but what of that!

"I have only one observation that is a source of regret. I endorsed the opinions in question but I would have been happier if they had

been delivered by a five-member majority instead of a four-member majority. This would have been helpful."

Thus the views of an authority on the law.

CERTIORARI IN THE FEDERAL COURTS—TIME FOR FILING PETITION—OPINION BY MR. JUSTICE FRANKFURTER

The editor has received the following letter from the Clerk of the Supreme Court of the United States.

"Dear Sir:

"Mr. Justice Frankfurter on May 24, 1957, rendered the attached opinion in considering an application for an extension of time within which to file a petition for a writ of certiorari.

"Inasmuch as it may be of interest to other attorneys confronted with the same problem, it is forwarded to you with the thought that you may desire to print it in the Massachusetts Law Quarterly.

Yours truly,

JOHN T. FEY, *Clerk*"

SUPREME COURT OF THE UNITED STATES

Samuel C. Brody, Petitioner,
v.
United States of America.
On application for Extension of Time Within Which to File a Petition for Writ of Certiorari.

OCTOBER TERM, 1956.

[May 24, 1957.]

MR. JUSTICE FRANKFURTER.

Important reasons of public policy require the filing within thirty days of a petition for a writ of certiorari to review a judgment of a court of appeals in a case of criminal contempt. An extension of this time limit obviously should be granted only in those exceptional circumstances in which the policy behind the general rule is properly to be subordinated to a more compelling policy. Counsel's engagement in a litigation in another court during the thirty-day period is certainly not a ground that requires the public policy behind the thirty-day rule to yield. One of the most obdurate defects in our administration of justice is delay. Due regard for its avoidance is emphasized in a situation like the present where the extension requested would make disposition of the petition for certiorari go over into the next Term of Court.

Too frequent is the suggestion of counsel asking for extension that more time is required for "research" on the questions to be presented by the petition for certiorari. I cannot emphasize too strongly that petitions for certiorari all too frequently misconceive the true nature of such petitions—the considerations governing review on certiorari—and the manner of presenting them. It does not require heavy research to charge the understanding of this Court adequately on the gravity of the issue on which review is sought and to prove to the Court the appropriateness of granting a petition for a writ of certiorari. Particularly is this so when the controlling ground on which the petition is to be based has had the consideration that it has had in this case, in the opinion of District Judge Aldrich in the first instance, 147 F. Supp. 897, and on review by Chief Judge Magruder for the Court of Appeals.

Were it not for the fact that the time for filing a petition in this case expires on Monday next, May 27, and the application for extension of time has been filed here the last minute, as it were, I would deny the application outright. I certainly feel that there is no justification for granting the request for an extension of thirty days. Under the circumstances, I will grant a few days of grace. I see not the slightest reason why a wholly adequate petition in this case—in typewritten form if necessary—cannot be prepared in time to be filed not later than Wednesday, May 29. This will give the Government an opportunity for a response and this Court an opportunity to dispose of the petition before the end of the Term.

I have heretofore acted upon the attitude expressed in this memorandum in similar applications that have been addressed to me. I have spelled out my attitude in some detail for the special attention of the bar of the First Circuit.

SOME HIGHLIGHTS IN A HALF CENTURY OF MASSACHUSETTS STATUTORY HISTORY

by

STANLEY E. QUA

Fifty-three years is a long time in the life of any man and in the life of any community as well. It is also a long time in the life of any profession. It is more than half a century. It is the time that has elapsed since the writer became a member of the bar in 1904.

It is the purpose of this article to direct the attention of members of the bar to some of the more important developments in the law during this period. Younger lawyers may be interested in observing the sequence of events and in noticing when and how rights and duties with which they are familiar in their daily work came into the law. Older lawyers will remember the advent of most of the innovations here mentioned. Both young and old may be surprised to note how much of the subject matter of their present practice did not exist at the beginning of the century.

Mention will be limited to statutory additions and changes. The law has of course been developing by judicial decision as well, but this development is gradual and over considerable periods hardly perceptible. There are comparatively few decisions so revolutionary that they can be definitely recognized as points of departure for important new principles, and to attempt to deal with these would involve discussion beyond anything here contemplated. A statute, on the other hand, bursts forth all at once like a nova in the night sky. The tremendous changes in the Federal field are also beyond the modest scope here attempted.

Even in dealing with State statutes alone there is so much material having some claim to be mentioned that the problem is how to exclude rather than to admit. Opinions may well differ, and the relative importance of certain statutes may in a decade or two hence appear different than at present. In general, only those will be included about which there seems no substantial doubt. And in general only the first appearance of each statute will be mentioned. The inclusion of subsequent amendments, extensions, and reenactments would lead to references that by their number and complexity would thwart our present purpose, which is no more ambitious than to spread in orderly array the more important innovations in State statutory law that have been introduced within the recollection of the writer.

Inconsistently enough, it seems desirable to begin with a brief look backward to the criminal pleadings act (St. 1899, c. 409) passed before the period intended to be covered. This statute accomplished for the criminal law a simplification comparable to that brought about in civil procedure at law by the practice acts

of 1851 and 1852. The act of 1899 may well be the reason why no statute involving criminal pleading in general has been considered of quite sufficient moment to be included in the list of statutes hereinafter mentioned. It certainly requires that caution be used in citing decisions on criminal pleading rendered before the act was passed.

Reference should perhaps also be made to the business corporation law (St. 1903, c. 437), and to St. 1903, c. 473, the first general regulation of motor vehicles and the nucleus around which our motor vehicle law has been constructed.

Coming now to the period we set out to examine, we encounter first the act relative to delinquent children (St. 1906, c. 413) superseding in most instances the former criminal proceedings against children under seventeen years of age and beginning the new methods of dealing with youthful offenders. In the same year the Boston Juvenile Court was established. St. 1906, c. 489.

The following year we saw the extension of the tax on legacies to include those passing to relatives in the direct line. St. 1907, c. 563.

In 1908 came the sales act (St. 1908, c. 237) by which was clarified and made uniform one of the most complicated and difficult areas of the law of frequent application in litigation. This act may be considered one of the most important in the entire series.

The workmen's compensation law, enacted as St. 1911, c. 751, may perhaps be regarded as the most far reaching legislation passed during the entire period under consideration. It completely changed the method of compensation of employed persons for personal injuries. Previously this field had been dominated by the fellow servant rule enunciated through Chief Justice Shaw in *Farwell* v. *Boston and Worcester Railroad Corp.* 4 Met. 49, the doctrine of assumption of risk (*Rooney* v. *Sewall and Day Cordage Co.* 161 Mass. 153), and the doctrine of contributory negligence, mitigated as to the first two doctrines just mentioned by the employer's liability act when there was a "defect in the condition of [the defendant's] ways, works or machinery," or the negligence of a person "entrusted with and exercising superintendence," or the negligence of a person who had "the charge or control of any signal, switch, locomotive engine or train upon a railroad." St. 1887, c. 270. The expressions above quoted were common jargon in the office of every general practitioner, and an immense body of learning grew around them which for the most practical purposes was swept aside by the compensation law.

In 1912 conveyances of real estate between husband and wife were authorized. St. 1912, c. 304.

The same year saw the beginnings of the procedure under which, in order to avoid double trials, cases may be removed before trial from a district court to the Superior Court, and under which questions of law arising in a district court are reported to an appellate

division of that court, subject to appeal to the Supreme Judicial Court. St. 1912, c. 649. Before this statute, cases, usually involving only small sums, were tried first in a district court and then were fully tried again on an appeal to the Superior Court.

In the next year the law as to illegitimate children and their maintenance was entirely rewritten and the proceeding turned over to the criminal side of the court. St. 1913, c. 563.

Also in 1913 was passed the municipal finance act designed to secure more uniform and more responsible methods of financing the operations of cities and towns. St. 1913, c. 719.

In 1914 was enacted the due care statute so-called by which in actions for injuries or death of a person or injury to property the burden of proving contributory negligence of the person injured or killed was placed on the defendant. St. 1914, c. 553. The scope of the original act was later considerably enlarged by St. 1947, c. 386, and St. 1952, c. 533. These statutes furnish at least a partial answer to the complaint sometimes heard that the Legislature is too much occupied with other matters to give attention to needed changes or corrections on matters of procedure.

In 1915 came the act providing for standard city charters to be adopted at the option of the various cities without the necessity of legislation in each instance. St. 1915, c. 267.

In the same year the law relating to mechanic's and material men's liens on buildings and lands was entirely rewritten with many changes. St. 1915, c. 292.

In 1916 the income tax became a part of the tax structure of the commonwealth. St. 1916, c. 269. Some of us who remember nostalgically the days when there was no income taxes at all and a man could keep what he earned have never become fully reconciled to this type of taxation, even though we must admit its necessity. Those who were, so to speak, born into this tax have no such psychological handicap to overcome.

In 1919 provision was made for direct appeals from the probate courts to the full bench of the Supreme Judicial Court without the hearing by a single justice that had been required by the previous practice. St. 1919, c. 274.

And by St. 1919, c. 306, provision was made for the registration of aircraft and the licensing of operators.

In 1920 the Commonwealth provided for the registration of women voters in accordance with the nineteenth amendment to the Constitution of the United States. St. 1920, c. 579. This was supplemented by St. 1922, c. 371, making women eligible to hold office.

In the year 1920 also appear the first seeds of the zoning laws in St. 1920, c. 601. It may be that zoning has been overdone in some communities. At any rate it has become one of the most prolific sources of litigation. (See now complete revision in General Laws, c. 40 A, inserted by St. 1954, c. 368.)

In 1921 the Legislature passed the sale of securities act commonly known as the "blue sky law" and appearing in the General Laws as c. 110 A. St. 1921, c. 499.

In this same year was enacted the beginnings of the "Briggs law" for the examination of the mental condition of certain persons held for trial. St. 1921, c. 415.

In 1922 was passed the uniform partnership act. St. 1922, c. 486.

By St. 1922, c. 532, jurisdiction of libels for divorce was given to the probate courts and provision was made for appellate divisions in all district courts, and for other jurisdictional changes.

The uniform law of fraudulent conveyances, one of the best drawn and most useful of the uniform laws, was enacted as c. 147 of the acts of 1924, and now appears as c. 109 A in the General Laws.

The year 1925 produced the statute under which certain felony cases come to the Supreme Judicial Court upon the entire transcript of the trial. St. 1925, c. 279.

In this same year motor vehicle liability insurance became compulsory. St. 1925, c. 346.

By St. 1928, c. 317, registration of a motor vehicle in the name of a defendant became prima facie evidence that it was being operated by his agent.

Old age assistance came in with St. 1930, c. 402. (See now c. 118 A of the General Laws.)

The year 1935 saw at least three enactements of great importance: (1) the act relative to injunctions and contempt procedure in labor disputes (St. 1935, c. 407), (2) the original housing authority law (St. 1935, c. 449, subsequently much amended and enlarged to permit urban redevelopment projects and urban renewal projects, St. 1945, c. 654, St. 1955, c. 654), and (3) the original employment security law. St. 1935, c. 479.

In 1945 the doctrine of imputed negligence in cases of infant plaintiffs was abolished. St. 1945, c. 352.

A statute of the same year (St. 1945, c. 582) inserted into the General Laws, c. 231 A, making provision for declaratory judgments. Previously such declaratory provisions as existed rested upon rules of courts. This statute is one of the most important and useful in the entire list. Many suits have been brought under it. Although the entertaining of such suits is discretionary with the courts, a liberal policy has been followed and the rights of many litigants have been determined before they have been compelled to incur injury or loss.

In 1954 was passed the State administrative procedure law, now c. 30 A of the General Laws. St. 1954, c. 681. This statute, when fully understood and put into practice, should prove of great value in standardizing the proceedings of administrative boards and in securing the rights of individuals affected by the conduct of administrative agencies.

It may seem that the foregoing summary too much resembles Homer's catalogue of the ships. To this charge the writer must plead guilty. His only excuse is that if his purpose is worth accomplishing at all it could hardly be accomplished in any other way.

STANDARDS OF TRIAL CONDUCT PROMULGATED BY THE AMERICAN COLLEGE OF TRIAL LAWYERS

(Introductory Note)

The world is trying to get "Ethical" at last on paper—not only the Nations, or some of them, but all kinds of individuals and associations in business as well as in the professions. Cynics can do and will ridicule it all but never mind them. The movement is healthy and so long as the "Codes" or "Standards" of conduct put on paper do not become too detailed the *movement* is of special importance to the legal profession.

In the "Quarterly" for September 1956 (page 33), we called attention to the fact that

> "All over the country the bar has been orating, protesting, and even at times whining about the "unauthorized practice" of law. But unless the bar maintains the professional spirit and standards which alone justify their respected privilege to practice, they will gradually find themselves losing public respect more and more. This actually happened after the civil war during the Tweed regime in New York. It led to the organization of the Bar Association of the City of New York to drive corrupt judges from the bench and preserve and revive standards of decency. Such standards are not "high-brow stuff." They are the essence of the "authorized" profession which alone justify protests against "unauthorized practice."

Of course, lawyers who violate decent standards of behavior are themselves indulging in "unauthorized practice."

For that reason we reprinted in full (with an introductory note) the "Statement" of the Special Committee of the American Bar Foundation about the current re-examination of the Canons of professional ethics and of Judicial ethics with a request for suggestions by that committee.

For the same reason we now reprint in full from the American Bar Association Journal for March 1957 the recently published "Code of Trial Conduct" prepared by the American College of Trial Lawyers for consideration of the bench and bar. F. W. G.

THE STANDARDS

(Reprinted from the American Bar Association Journal)

Meeting in Dallas, Texas, last August, the American College of Trial Lawyers adopted a "Code of Trial Conduct" which is published on these pages. The Code is the result of more than three years' effort by the members of the College, and, like the trial drafts that preceded it, was scrutinized by trial lawyers from all parts of the United States. The College of Trial Lawyers is aware of the fact that there are imperfections in the Code and requests that Journal readers send their suggestions and criticisms to the national headquarters of the College, at 921 Westwood Boulevard, Los Angeles 24, California.

PREFACE

The American College of Trial Lawyers is a national voluntary association of members of the Bars of the several states who devote themselves in major part to trial advocacy on behalf of public and private clients in all fields of law and on both sides of the trial table in the *nisi prius* courts of the nation and before state and federal administrative agencies, boards, commissions and bureaus. A great many members of the Society take an active part in the work of the organized Bar of the nation and of their respective states, districts and local communities, especially those activities of the organized Bar that are directed to the fields of practice, pleading and procedure, preparation and trial of cases, court organization and administration, litigation procedures, judicial selection and tenure, and improvement of the administration of justice.

The members of the society have particular interest in maintaining high standards of professional conduct and deportment in the courtroom and hearing room. There is but little in the way of published materials and lore, either in this country or in England, on the subject of trial conduct. A few years ago it was suggested to the officers and Board of Regents of the College that a code of standards of trial conduct for the trial lawyer be prepared and published. A special committee of distinguished trial lawyers, under the chairmanship of Clarence Runkle, a Judge of the Superior Court of California in and for Los Angeles County, was appointed. The committee enlisted the aid, comments and suggestions of members of the society across the nation, of trial judges of state and federal courts, and of presiding officers of state and federal administrative agencies. A wealth of comments and suggestions was received. A careful study was made of published decisions, law reviews and legal periodicals, legal history and various trial lore. Drafting and redrafting ensued. After several years of work a tentative final draft of a Code of Trial Conduct for the Trial Lawyer resulted. It was approved by the Board of Regents and adopted by the members of the College at the annual meeting held in Dallas, Texas, in August, 1956.

As stated in the Preamble, the Code is intended to supplement and stress certain portions of, but not to supplant, the Canons of Professional Ethics promulgated by the American Bar Association. The standards advanced are minimum standards. An unexpressed but ever present over-all consideration is that the trial lawyer is an officer of the court and is in the last analysis a gentleman. He should at all times conduct himself with these considerations in mind. He is engaged in a profession and not a business.

This Code of Trial Conduct for the Trial Lawyer is published by the College and distributed to trial lawyers and judges of courts of record and presiding officers of major administrative hearing agencies throughout the nation in the hope that it will serve the dignity of the law, improve the administration of justice, advance decorum in the court and hearing room and aid in maintaining high standards of personal and professional conduct on the part of trial advocates throughout the United States.

So far as is known, this is the first time any lawyer group has undertaken to promulgate a code of standards of ethics, deportment and conduct for the trial lawyer.

We are aware that the Code has imperfections, despite the devotion of the special committee to its task. Constructive suggestions and criticisms are invited.

AMERICAN COLLEGE OF TRIAL LAWYERS

CODE OF TRIAL CONDUCT

PREAMBLE

Lawyers who engage in trial work have a specific responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation. The American Bar Association has promulgated Canons of Professional Ethics for the legal profession as a whole. The American College of Trial Lawyers, because of its particular concern for the improvement of litigation proceedings and trial conduct of counsel, presents this Code of Trial Conduct for trial lawyers, not to supplant but to supplement and stress certain portions of the Canons of Professional Ethics. Generally speaking, the purposes and objectives of this Code are embodied in the following considerations:

To his client, the lawyer owes undivided allegiance, the application of the utmost of learning, skill and industry, and the employment of all honest and appropriate means within the law to protect and enforce legitimate interests. In the discharge of this duty, the lawyer should not be deterred by any real or fancied fear of judicial disfavor or public unpopularity, nor should he be influenced, directly or indirectly, by any considerations of self-interest.

To opposing counsel, the lawyer owes the duty of courtesy, candor in the pursuit of the truth, co-operation in all respects not inconsistent with his client's interests and scrupulous observance of all mutual understandings.

To the office of judge, the lawyer owes respect, diligence, candor and punctuality, the maintenance of the dignity and independence of the judiciary, and protection against unjust and improper criticism and attack.

To the administration of justice, the lawyer owes the maintenance of professional dignity and independence and conformity to the highest principles of professional rectitude, notwithstanding the desires of his client or others.

This Code expresses only minimum standards and should be construed liberally in favor of its fundamental purpose, consonant with the fiduciary status of the trial lawyer, and so that it shall govern all situations whether or not specifically mentioned herein.

1. ACCEPTANCE OF EMPLOYMENT IN CIVIL CASES.

In civil litigation, the lawyer should decline to prosecute a cause or assert a defense obviously devoid of merit, or which is intended merely to inflict harassment or injury, or to procure an unmerited settlement, or in which he, his firm or associates have conflicting interests.

2. CONTINUANCE OF EMPLOYMENT IN CIVIL CASES.

After acceptance of employment the lawyer, unless discharged, should diligently conduct the cause to an expeditious conclusion. He may not withdraw except at a time or in circumstances when the withdrawal will not adversely affect the interests of the client. He may withdraw at any time with the consent of the client or with the approval of the court if a procedure for obtaining approval exists, or if his continuance in the representation of the client will involve his knowing participation in the perpetration of a fraud. Upon withdrawal after receipt of retainer, the lawyer should refund any portion thereof that has not been earned.

3. EMPLOYMENT IN CRIMINAL CASES.

Every person accused of crime has a right to a fair trial, including persons whose conduct, reputation or alleged violations may be the subject of public unpopularity or clamor. This places a duty of service on the legal profession and, even though the lawyer is not bound to accept particular employment, requests for service in criminal cases should not lightly be declined or refused merely on the basis of the lawyer's personal convenience or opinion concerning the guilt of the accused, or repugnance to the accused or to the crime charged.

4. CONDUCT OF CRIMINAL CASES.

(a) Having accepted employment in a criminal case, the lawyer's duty, regardless of his personal opinion as to the guilt of the accused, is to invoke the basic rule the crime must be proved beyond a reasonable doubt by competent evidence, to raise all valid defenses and, in case of conviction, to present all proper grounds for probation or mitigation of punishment. A confidential disclosure

of guilt alone does not require a withdrawal from the case. However, after a confidential disclosure of facts clearly and credibly showing guilt, the lawyer should not present any evidence inconsistent with those facts. He should never offer testimony which he knows to be false.

(b) The crime charged should not be attributed to another identifiable person unless evidence introduced or inferences warranted therefrom raise at least a reasonable suspicion of that person's probable guilt.

(c) The prosecutor's primary duty is not to convict, but to see that justice is done. Credible evidence that might tend to prove the accused's innocence should not be suppressed.

5. Acquiring Interest in Litigation.

A lawyer should never purchase or otherwise acquire, directly or indirectly, any interest in the subject matter of the litigation which he is conducting, provided, however, that nothing herein shall prohibit a just and reasonable contingent fee contract.

6. Lawyer as Witness.

When a lawyer knows, prior to trial, that he will be a necessary witness, except as to merely formal matters such as identification or custody of a document or the like, neither he nor his firm or associates should conduct the trial. If, during the trial, he discovers that the ends of justice require his testimony, he should, from that point on, if feasible and not prejudicial to his client's case, leave further conduct of the trial to other counsel. If circumstances do not permit withdrawal from the conduct of the trial, the lawyer should not argue the credibility of his own testimony.

7. Personal Experiments.

A lawyer should never conduct or engage in experiments involving any use of his own person or body except to illustrate in argument what has been previously admitted in evidence.

8. Discretion in Co-operating with Opposing Counsel.

The lawyer, and not the client, has the sole discretion to determine the accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments and admission of facts.

9. Relations with Opposing Counsel.

(a) A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom. When he knows the idenity of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed.

(b) A lawyer should avoid indulgence in disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients. He should abstain from any allusion to personal peculiarities and idiosyncracies of opposing counsel.

10. WITNESS.

(a) A lawyer should thoroughly investigate and marshal the facts. Subject to the provisions of Paragraph 11 hereof, he may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of the opposing counsel or party. He should avoid any suggestion calculated to induce any witness to suppress evidence or deviate from the truth. He should avoid taking any action calculated to secrete a witness. However, except when legally required, it is not his duty to take affirmative action to disclose any evidence or the identity of any witness.

(b) A lawyer should not participate in a bargain with a witness either by contingent fee or otherwise as a condition of his giving evidence, but this does not preclude the payment of reasonable and noncontingent compensation for actual loss of time and expenses of persons who cannot afford to attend or will not appear and testify for the statutory fees; nor does it preclude payment of non-contingent fees to expert witnesses.

(c) A lawyer may advertise for witnesses to a particular event or transaction but not for witnesses to testify to a particular version thereof.

(d) A lawyer should never be unfair or abusive or inconsiderate to adverse witnesses or opposing litigants, or ask any question intended only to insult or degrade the witness. He should never yield, in these matters, to suggestions or demands of his client or allow any malevolence or prejudice of the client to influence his actions.

(e) A lawyer should not ask questions which affect the witness' credibility only by attacking his character, except those encompassed in recognized impeachment procedures.

11. COMMUNICATIONS WITH OPPOSITE PARTY.

A lawyer should not in any way communicate upon the subject of controversey with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. He should avoid everything that might tend to mislead a party not represented by counsel, and he should not undertake to advise him.

12. RELATIONS WITH THE JUDICIARY.

A lawyer should never show marked attention or unusual hospitality to a judge, uncalled for by the personal relations of the parties. He should avoid anything calculated to gain or having the

appearance of gaining special personal consideration or favor from a judge.

13. TRIAL CONDUCT TOWARD JUDGE.

(a) During the trial, the lawyer should always display a dignified and respectful attitude toward the judge presiding, not for the sake of his person, but for the maintenance of respect for and confidence in the judicial office. It is both the right and duty of the lawyer fully and properly to present his client's cause and to insist on an opportunity to do so. He should vigorously present all proper arguments against rulings he deems erroneous and see to it that a complete and accurate case record is made. In this regard, he should not be deterred by any fear of judicial displeasure or even punishment. The lawyer, regardless of fear, threat or imposition of punishment, should not reveal the confidences of his client.

(b) A lawyer should not discuss a pending case with the judge without the opposing lawyer's presence, unless, after notice, or request, the opposing lawyer fails or refuses to attend and the judge is so advised.

(c) Except as provided by rule or order of court, a lawyer should never deliver to the judge any letter, memorandum, brief or other written communication without concurrently delivering a copy to opposing counsel.

(d) Subject to the foregoing, a lawyer may advise the judge of any reason for expediting or delaying the decision.

14. JURY.

(a) A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, such as fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like. Before and during the trial, he should avoid conversing or otherwise communicating with a juror on any subject whether pertaining to the case or not.

(b) A lawyer should disclose to the judge and opposing counsel any information of which he is aware that a juror or a prospective juror has or may have any interest, direct or indirect in the outcome of the case, or is acquainted or connected in any manner with any lawyer in the case or any partner or associate or employee of the lawyer, or with any litigant, or with any person who has appeared or is expected to appear as a witness, unless the judge and opposing counsel have previously been made aware thereof by *voir dire* examination or otherwise.

(c) It is the lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge.

(d) Before the jury is sworn to try the cause, a lawyer may investigate the prospective jurors to ascertain any basis for challenge, provided there is no communication with them, direct or indirect, or with any member of their families.

(e) A lawyer should, immediately upon his discovery thereof, make full disclosure to the court of any improper conduct by any person toward the jury or any member thereof.

15. COURTROOM CONDUCT.

(a) In the *voir dire* examination of the jury, a lawyer should not state or allude to any matter not relevant to the case or which he is not in position to prove by admissible evidence.

(b) A lawyer should not state as fact in his opening statement any matter unless he has reason to believe that it will be substantiated by the evidence.

(c) A lawyer should never misstate the evidence or state as fact any matter not in evidence, but otherwise has the right to argue in the manner he deems effective, provided his argument is mannerly and not inflammatory.

(d) A lawyer should not include in the content of any question the suggestion of any matter which is obviously inadmissible.

(e) A question should not be interrupted by an objection unless the question is then patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.

(f) A lawyer should conduct the *voir dire* examination and the examination of all witnesses either from the counsel table or other suitable distance except when handling documentary or physical evidence or when a hearing impairment or other disability requires that he take a different position.

(g) In all cases in which there is any doubt about the propriety of any disclosure to the jury, requests should be made for leave to approach the bench and to obtain a ruling out of the jury's hearing, either by making an offer of proof or by propounding the question and obtaining an immediate ruling.

(h) A lawyer should not assert in argument his personal belief in the integrity of his client or of his witnesses or in the justice of his cause, as distinct from a fair analysis of the evidence touching those matters.

(i) A lawyer should not engage in exchanges of banter, personalities, argument or controversy with opposing counsel. His objections, requests and observations should be addressed to the judge.

16. COURTROOM DECORUM.

(a) A lawyer should rise when addressing, or being addressed by, the judge, except when making brief objections or incidental comments.

(b) While the court is in session a lawyer should not smoke, assume an undignified posture, or, without the judge's permission, remove his coat in the courtroom. He should always be attired in a proper and dignified manner and abstain from any apparel or ornament calculated to attract attention to himself.

17. PUNCTUALITY AND EXPEDITION.

(a) A lawyer should be punctual in all court appearances and, whenever possible, should give prompt notice to the court and to all other counsel in the case, of any circumstances requiring his tardiness or absence.

(b) A lawyer should make every reasonable effort to prepare himself fully prior to court appearances. He should promptly inform the court of any settlement, whether partial or entire, with any party, or the discontinuance of any issue.

(c) A lawyer should see to it that all depositions and other documents required to be filed are filed promptly, should stipulate in advance with opposing counsel to all non-controverted facts, should give opposing counsel, on seasonable request, an opportunity in advance to inspect all non-impeaching evidence of which the law permits inspection, and, in general, should do everything possible to avoid delays and to expedite the trial.

18. CANDOR AND FAIRNESS.

(a) The conduct of the lawyer before the court and with other lawyers should at all times be characterized by candor and fairness.

(b) A lawyer should never knowingly misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or, with knowledge of its invalidity, cite as authority a decision that has been vacated or overruled, or a statute that has been repealed; or in argument assert as a fact that which has not been proved, or, in those jurisdictions in which a side has the opening and closing arguments, mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

(c) A lawyer should be extraordinarily careful to be fair, accurate and comprehensive in all *ex parte* presentations and in drawing or otherwise procuring affidavits.

(d) A lawyer should not offer evidence which he knows is inadmissible, and he should not endeavor to get the same before the jury in any manner. Neither should he include in an argument, addressed to the court, remarks or statements intended improperly to influence the jury or the public.

(e) A lawyer should not propose a stipulation in the jury's presence unless he knows or has reason to believe the opposing lawyer will accept it.

(f) A lawyer should never employ dilatory tactics of any kind to procure more fees.

(g) A lawyer should never file a pleading or any other document he knows to be false in whole or in part or which is intended only for delay.

19. ADVERSE AUTHORITIES.

A lawyer should not attempt to mislead the court by citations of authorities he knows have been overruled or distinguished.

20. PUBLICATIONS RE PENDING LITIGATION.

A lawyer should not publish, cause to be published, or aid or abet in any way, directly or indirectly, the publication in any newspaper or other documentary medium, or by radio, television or other device, of any material concerning a case on trial or any pending or anticipated litigation calculated or which might reasonably be expected to interfere in any manner or to any degree with a fair trial in the courts or otherwise prejudice the due administration of justice. If extreme circumstances of a particular case require a statement to the public, it should not be made anonymously and no reference to the facts should go beyond quotation from the records and papers on file in court or other official documents, and no statement should be made which indicates intended proof or what witnesses will be called, or which amounts to comment or argument on the merits of the case.

21. DISCOVERY OF IMPOSITION OR DECEPTION.

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court, a party, or other counsel, he should promptly endeavor to rectify it.

22. APPLICABILITY.

This Code of Trial Conduct applies to all lawyers, whether engaged in private practice or public employment.

NEW STATUTE OF LIMITATIONS ON FORECLOSURES OF OLD MORTGAGES

This Chapter 370 is one of the bills relative to the marketability of land recommended by the Judicial Council in its 32nd report in 1956 for the reasons there stated (pp. 20-22) reprinted in 40 Mass. Law Quarterly No. 4, Dec. 1956.

F. W. G.

[CHAP. 370]

AN ACT TO PROTECT LAND TITLES AGAINST OBSOLETE MORTGAGES.

Chapter 260 of the General Laws is hereby amended by adding after section 32, as appearing in the Tercentenary Edition, under the caption LIMITATION OF MORTGAGE FORECLOSURES, the following three sections:—*Section 33.* No power of sale in any mortgage of real estate shall be exercised and no entry shall be made nor possession taken nor proceeding at law or in equity begun for foreclosure of any such mortgage after the expiration of a period which shall be fifty years from the recording of the mortgage in case of mortgages recorded on or after January first, nineteen hundred and thirteen, and which shall be from the recording of the mortgage until January first, nineteen hundred and sixty-three, in case of mortgages recorded before January first, nineteen hundred and thirteen, unless in either case an extension of the mortgage, or an acknowledgment or affidavit that

the mortgage is not satisfied, is recorded within the last ten years of such period. In case an extension of the mortgage or such an acknowledgment or affidavit is so recorded, the period shall continue until ten years shall have elapsed during which there is not recorded any further extension of the mortgage or acknowledgment or affidavit that the mortgage is not satisfied. The period shall not be extended by reason of a longer duration of the debt or obligation secured being stated in the mortgage or in any extension of the mortgage, or otherwise, or by non-residence or disability of any person interested in the mortgage or the real estate, or by any partial payment, agreement, extension, acknowledgment, affidavit or other action not meeting the requirements of this section and sections thirty-four and thirty-five.

Section 34. No extension of the mortgage, and no acknowledgment that the mortgage is not satisfied, whether contained in a conveyance or in a separate instrument, shall be sufficient to extend the period specified in section thirty-three unless it is executed by one or more of the person or persons then appearing of record to own the real estate then subject to the mortgage, and describes the mortgage sufficiently to identify the record of it, and states that the property is subject to the mortgage or that the mortgage is not satisfied. No affidavit that the mortgage is not satisfied shall be sufficient to extend the period unless it is executed by the holder of the mortgage, describes the mortgage sufficiently to identify the record thereof, names one or more of the person or persons then appearing of record to own the real estate then subject to the mortgage, and states that the mortgage remains unsatisfied, and if the mortgage secures a promissory note or sum of money, the amount believed to remain unpaid. The holders of mortgages or other encumbrances shall not be considered owners. The register of deeds upon payment of the fee required by law shall record any such affidavit and any such acknowledgment contained in a separate instrument, and enter upon the margin of the record of the mortgage a note of reference to the record of the affidavit or acknowledgment and index it in the grantor index under the names of the owner or owners named in the affidavit or executing the acknowledgment.

Section 35. For the purposes of this section and sections thirty-three and thirty-four, the term "mortgage" includes any deed of trust or other conveyance made for the purpose of securing performance of a debt or obligation, and no proceeding at law or in equity shall be considered begun until a memorandum as required by section fifteen of chapter one hundred and eighty-four has been recorded in the registry of deeds for the county or recording district in which the real estate is situated. When any mortgage includes parcels in different ownerships at the time of recording of an extension, acknowledgment or affidavit the recording shall be sufficient only for the parcels which the owner or owners executing the extension or acknowledgment or named in the affidavit then appear of record to

own. When the real estate is situated in more than one county or district, recording in any county or district shall be sufficient only for the real estate there situated. The provisions of this section and sections thirty-three and thirty-four shall not apply in case of real estate registered by the land court, nor revive, preserve or extend any mortgage otherwise ineffective, nor affect enforcement of the debt or obligation otherwise than against the real estate mortgaged.

Approved May 14, 1957.

VERIFICATION UNDER THE PENALTY OF PERJURY IN COURT PROCEEDINGS

A District Court Judge who has been sitting in the Superior Court suggests that there is a hole in the statute allowing answers to interrogatories to be verified by a declaration under the penalty of perjury instead of the former oath taken before a Justice of the Peace or Notary Public. He suggests that as the answers to interrogatories are subject to cross-examination, the omission of the date of verification is a mistake. His letter to the Secretary of the Judicial Council follows:

June 27, 1957

"Dear Mr. Grinnell:

"May I suggest for your consideration an amendment to G. L. 268/1a. Since last September I have been sitting in the Superior Court to hear motor tort cases.

"Interrogatories are generally filed by both parties and the parties are generally questioned at the trial on their answers, particularly on the issues of negligence and damages. The practice of attorneys is to have the answers 'verified by a written declaration that it is made under the penalties of perjury.' G. L. 268/1a. Rarely is the *date* of the verification set forth in the answers.

"The date of the verification is many times important and frequently the subject of lengthy cross-examination. This time consuming factor in trials could be easily eliminated by an amendment to the statute requiring the date of the verification to be set forth as was the practice when an oath was taken by a notary public. The date as bearing on the commencement of the running of the statute of limitations could also be important in any prosecution for perjury. G. L. 268/1.

Respectfully yours,

ARTHUR T. GARVEY, *Justice*"

District Court of Western Hampden
Westfield, Massachusetts

We took an active part years ago in proposing and securing the passage of the act allowing verification under the penalty of perjury

instead of an oath to income tax returns and so forth. That original act did not extent to proceedings in court. Its extension to such court proceedings was made by a later statute. We have always been skeptical as to the wisdom of this extension because an oath before an official such as qualifying oath for persons appointed or otherwise selected for public office *and* oaths in court are still, in our opinion, important. The difficulty with the millions of silly oaths formerly common was that multitudes of perfunctory oaths weakened all oaths. We suggest that the change suggested by Judge Garvey could be accomplished by a mandatory rule of the courts as to the effectiveness of the verification. This seems to us clearly within the rule-making power of the various courts as well as of the Supreme Judicial Court.

Counsel can accomplish this object as some lawyers do by inserting as one of the interrogatories the question "On what date are these verified answers made?" It is a wise practice.*

F. W. G.

*A carefully prepared article on interrogatories by George K. Black, Esq., of the Boston Bar appears in 33 Mass. Law Quarterly No. 1 for April 1948. Practitioners may find it helpful.

BILLS FOR DISCOVERY— THE LATEST MASSACHUSETTS OPINION

The bar in general has been unfamiliar with the practice of bills for discovery in Massachusetts since the Practice Act of '51 and they have seldom been used, but they still exist to a very limited extent. The court, in a recent exhaustive and carefully discriminating opinion, has traced their history and drawn the lines for their possible use so clearly that we reprint the opinion by Mr. Justice Cutter in full so that the bar may be fully informed of the narrow limits within which this unfamiliar procedure is still possible.

F. W. G.

JOHN A. MACPHERSON *vs.* BOSTON EDISON COMPANY & others.

1957 Advance Sheets

(pp.—— to ——)

Suffolk. December 4, 1956.—May 14, 1957.

Present: WILKINS, C.J., RONAN, SPALDING, WILLIAMS, COUNIHAN, WHITTEMORE, & CUTTER, JJ.

Equity Jurisdiction, Discovery. *Equity Pleading and Practice*, Demurrer, Parties, Suit for discovery.

Suit in equity heard in the Superior Court by *Kirk*, J., on demurrers.

CUTTER. J. The plaintiff filed a bill for discovery against Boston Edison Company (hereinafter called Edison), its president, Thomas G. Dignan, Norumbega Park-Totem Pole Corporation (hereinafter called Norumbega) and its president, Thomas L. Gill. The

plaintiff appeals from the interlocutory decree sustaining the general demurrers of the defendants and from the final decree dismissing the bill.

The bill alleges the following facts among others. An action at law, which is still pending, was brought against Edison by the plaintiff, in the Superior Court, to recover for injuries sustained on April 24, 1952, while working upon Norumbega's premises as a painter for an independent contractor. The plaintiff came in contact with a high voltage wire. While struggling to free himself, the staging upon which he was working collapsed and he was thrown to the ground. The declaration alleged that the wire was owned by Edison as part of an electrical system maintained by Edison in a negligent manner. The plaintiff in the action at law filed interrogatories to Edison. Exceptions are pending to the denial of his motion for further answers. The plaintiff also had recourse to the procedure under G. L. (Ter. Ed.) c. 231, § 69, as appearing in St. 1946, c. 450, for securing the formal admission of facts.

The plaintiff further asserts in his bill that he has a cause of action against Norumbega; that he cannot go upon the land of Norumbega to make examination of the premises; that the plaintiff, because confined to the hospital for a prolonged period, was unable to cause prompt investigation of the accident to be made; that the location of the relevant wires has been intentionally changed since the accident; and that there are various other difficulties which prevent the plaintiff from discovering important facts about the ownership, control, and location of these wires at the time of the accident. The bill is argumentative and diffuse and contains many immaterial statements. It seeks no equitable relief apart from discovery, but it asks discovery on a wide range of questions of a character which, so far as properly to be asked under any procedure, might be asked by interrogatories in the action at law, and also requests that the court direct the defendants to permit the plaintiff's investigators "to go upon the premises owned by . . . Norumbega . . . and there make . . . examinations, tests . . . and photographs."

1. The demurrers are addressed generally to the whole bill and are not special demurrers to particular paragraphs. They cannot be sustained merely because particular paragraphs are vague and argumentative. *Collector of Taxes of Lowell* v. *Slafsky*, 332 Mass. 700, 704. *State Realty Co. of Boston, Inc.* v. *MacNeil Bros. Co.* 334 Mass. 294, 298.[1] The demurrers must be overruled if in this proceeding "the plaintiff is entitled to any of the discovery . . . [he] seeks." *Post & Co.* v. *Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341, 350. Questions of discretion to deny relief, which frequently considerably affect a determination whether discovery will be granted (see *Cline* v. *Cline*, 329 Mass. 649, 652-653), are not open upon demurrer. See *Massachusetts Chiropractic Laymen's Association, Inc.* v. *Attorney General*, 333 Mass. 179, 180.

[1] Mass. Adv. Sh. (1956) 819, 821.

2. The bill does not show that an action is pending against Norumbega and Gill and it is not specifically alleged that one is contemplated. On the facts appearing in the bill such an action for an injury occurring in 1952 would seem to be barred by the applicable statute of limitations. G. L. (Ter. Ed.) c. 260, § 2A, inserted by St. 1948, c. 274, § 2. If the plaintiff ever had a cause of action against Norumbega (compare *Trott* v. *Yankee Network, Inc.*——Mass. ——[1]), Norumbega now could be made a defendant only by the allowance of an amendment joining Norumbega in the pending action against Edison. *Johnson* v. *Carroll*, 272 Mass. 134, 136-138. See *King* v. *Solomon*, 323 Mass. 326, 331. "The allowance of such an amendment . . . rests in sound judicial discretion" *(Genga* v. *Director General of Railroads*, 243 Mass. 101, 104). A bill for discovery will not usually lie against strangers to pending or proposed litigation, like Norumbega and Gill, who at most are shown to be prospective witnesses, or to possess evidence which may be of use, in the action in aid of which discovery is sought. *American Security & Trust Co.* v. *Brooks*, 225 Mass. 500, 502. See Pomeroy, Equity Jurisprudence (5th ed.) § 197b. Accordingly, the demurrers of Norumbega and Gill would be sustained apart from the question, discussed later, whether discovery should be given as against Norumbega, for the sole purpose of giving the plaintiff opportunity to inspect the Edison wires and poles on Norumbega's land.

3. With respect to Edison and Dignan, the plaintiff's bill (a) reveals that efforts to obtain discovery by statutory methods in the action at law have not been completed, and (b) does not allege substantive facts showing that he cannot obtain under statutory discovery most of the pre-trial information from Edison and Dignan to which he is entitled. Accordingly, we first consider whether the plaintiff may have discovery by separate bill in equity in respect of those matters where the statutory procedure is adequate.

Statutory discovery includes (a) interrogatories, G. L. (Ter. Ed.) c. 231, §§ 61-67, 89; (b) demands for formal admissions, G. L. (Ter. Ed.) c. 231, § 69, as amended; and (c) examination of real estate in specified instances, G. L. (Ter. Ed.) c. 153, § 9; see *Wylie* v. *Blake & Knowles Steam Pump Works*, 221 Mass. 489, 490-492; *Owens-Illinois Glass Co.* v. *Bresnahan*, 322 Mass. 629, 633. These procedures were designed to "substitute, in place of the tedious, expensive and complex process of a bill of discovery . . ., an easy, cheap and simple mode of interrogating an adverse party, as incident to and part of the proceedings in the cause in which the discovery was sought." *Wilson* v. *Webber*, 2 Gray, 558, 561-562, which points out that interrogatories were introduced at a time when a party could not be a witness "to give a limited right to obtain evidence from an adverse party, in analogy to the well settled rules regulating bills of discovery in the court of chancery in England." See St. 1851, c. 233, §§ 98-111; St. 1852, c. 312, §§ 61-74.

[1] Mass. Adv. Sh. (1956) 1261.

Complicated rules governed bills for discovery and the pleadings connected with them under the old equity practice. See, for example, Langdell, Equity Pleading (2d ed.) §§ 38, 167-181; Langdell, Discovery under the Judicature Acts, 11 Harv. L. Rev. 137, 205, 207 et seq.; 12 Harv. L. Rev. 151; Story, Equity Jurisprudence (14th ed.) §§ 105-115; 1927-1956; G. T. Curtis, Equity Precedents, 110, 149-151. In most cases, discovery can now be as readily provided by the simple statutory interrogatories (available in equity as at law) as by the pre-1851[1] procedures. This probably is responsible for the insignificant use of bills for discovery during the last century.

The plaintiff relies on general statements, found in cases decided since 1851, indicating that bills for discovery are still within the equity jurisdiction of our courts. These cases were reviewed in *Owens-Illinois Glass Co.* v. *Bresnahan*, 322 Mass. 629, 631-634,[2] and include *Walker* v. *Brooks*, 125 Mass. 241, 248 (where discovery in connection with a bill for substantive relief was denied when the substantive relief was denied and the plaintiff did "not show that any discovery is required in aid of proceedings at law"); *Post & Co.* v. *Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341; *American Security & Trust Co.* v. *Brooks*, 225 Mass. 500, 501 (where discovery against one who was a stranger to prospective litigation was denied, the court saying, "There is no doubt of the jurisdiction of the court to entertain bills for discovery, although the usefulness of such bills has, to a great extent, been taken away by statutes authorizing interrogatories to the adverse party and compelling such party to testify at the trial"); *Rosenblum* v. *Springfield Produce Brokerage Co.* 243 Mass. 111, 120-121. Compare *Brown* v. *Corey*, 191 Mass. 189, 192, where it was said, "The bill cannot be maintained for discovery alone if that is not incidental to any relief which the court has the right to grant." The *Owens-Illinois* case (322 Mass. 629, 633) suggests that this meant only that, in view of denial of the substantive relief in connection with which discovery was sought in *Brown* v. *Corey*, there was no occasion for continuing the bill for discovery alone. The same comment may be made about the statements in *H. E. Shaw Co.* v. *Karcasinas*, 278 Mass. 397, 401. See also *Chamberlain* v. *James*, 294 Mass. 1, 12.

Various statutes indicate that equitable jurisdiction over bills for discovery still exists. General Laws (Ter. Ed.) c. 214, § 12, provides that "Discovery may be sought by inserting a prayer therefor in the bill or petition or by interrogatories." In G. L. (Terr. Ed.) c. 214, § 13, it is provided, "An answer, except to a bill for discovery

[1] In 1851, the commissioners (Benjamin R. Curtis, later an Associate Justice of the Supreme Court of the United States, Nathaniel J. Lord, of Salem, and Reuben A. Chapman, later Chief Justice of this court) to report a reform in judicial proceedings (see Res. 1849, c. 48) characterized the old equity bill for discovery as "a slow, expensive, and we think the experience of the profession will justify us in saying, almost a useless remedy." See Junius Hall, Practice Act of 1851, 156.

[2] See also discussions of the Massachusetts cases on discoverey in Richardson, Equity Pleading and Practice (1926) at pages 83-88; Reed Equity Pleading and Practice, §§ 294, 720. See Grinnell, Discovery in Massachusetts, 16 Harv. L. Rev. 110, 112-112, 193; 201-208.

only, . . . shall not be made under oath . . ." General Laws (Ter. Ed.) c. 261, § 12, reads in part: "In suits . . . in which, as to one or more of the defendants, the plaintiff seeks merely for a discovery of facts which are material to his rights . . . in a pending or anticipated suit, and not for a decree against them, the court shall allow such defendants all their reasonable costs . . ., and likewise although the plaintiff prays for a decree, if the court is satisfied that the prayer is frivolous, a mere pretence, or is not essentially connected with the subject matter of the discovery."[1]

The statutes (see *Owens-Illinois* case, 322 Mass. 629, 633) governing interrogatories do not expressly state that interrogatories are a substitute for equitable discovery, but in view of the limited character of the latter prior to the introduction of interrogatories by St. 1851, c. 233, § 98 (see Junius Hall, Practice Act of 1851; pages 124-128; 150-156; 194-197), and the much broader character of the statutory procedure, there is reason for the suggestion in the annotation of Superior Court Rules (1932), Rule 30, at page 113, that some at least of the statutory references to equitable discovery have been "unnecessarily and perhaps accidentally preserved."

There are few instances in which equitable discovery continues to have any practical significance. These are illustrated by some of the very rare bills for discovery considered by this court in the last century. The cases fall into two main groups.

The first group consists of bills seeking discovery alone. Here (despite broad language already quoted) relief in fact has been permitted only in circumstances (a) where the statutory procedure was inadequate to obtain the necessary information, and (b) where the information sought could have been obtained under a pre-1851 bill for discovery. The *Owens-Illinois* case (322 Mass. 629) is a recent example. There it was held that a bill could be maintained to obtain examination of a chattel, which could not be obtained by statutory interrogatories. See also *Post & Co.* v. *Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341 (which permitted a bill for discovery to obtain evidence in aid of a proposed action in Ohio, in which the statutory discovery procedures would have been wholly ineffectual). Compare, however, *American Security & Trust Co.* v. *Brooks*, 225 Mass. 500, 502-503 (where a bill for discovery was held, on demurrer, not to lie against a stranger to pending or proposed litigation).

In the second main group of cases discovery was prayed for as an incident to substantive equitable relief sought by the bill rather than as an aid to separate litigation. In *Rosenblum* v. *Springfield Produce Brokerage Co.* 243 Mass. 111, 120-121, it was said, in considering a demurrer to a bill for an accounting, that discovery could be had as an incident to the principal relief sought. *Walker* v. *Brooks*,

[1] See also the specialized provision for discovery in the Probate Court, where concealment of the assets of a deceased person is suspected. G. L. (Ter. Ed.) c. 215, § 44, as appearing in St. 1943, c. 91. See also *McNulty* v. *Howe*, 290 Mass. 597; *Cline* v. *Cline*, 329 Mass. 649.

125 Mass. 241, 248, *Brown* v. *Corey*, 191 Mass. 189, and *H. E. Shaw Co.* v. *Karcasinas*, 278 Mass. 397, 401, are instances where discovery, sought as an incident to other equitable relief, was denied when the main purpose of the bill failed. In *Ahrend* v. *Odiorne*, 118 Mass. 261, 269 (where the plaintiff sought both substantive relief and discovery), the court said that a bill for discovery cannot be maintained where "it is not shown that the discovery for which it prays is anything but incidental to the relief sought *or could not be had by interrogatories in an action at law*" (emphasis supplied).[1] This decisions, like *Wilson* v. *Webber*, 2 Gray, 558, 561-562, may reflect the contemporary view that in 1851 an adequate statutory procedure was substituted for an outworn equitable makeshift.

In the light of this history of discovery since 1851, both in equity and under the statutory methods, a majority of the court is of the opinion that our courts (with respect both to bills for discovery alone and to bills including incidental prayers for discovery) should not be required to exercise the ancient equity discovery jurisdiction except upon an affirmative allegation of facts in the bill establishing that the simpler statutory procedure is inadequate. The defence that there is an adequate statutory remedy properly may be raised by demurrer where the existence of the defence is shown by the allegations of the bill (see *Edgett* v. *Palmer*, 225 Mass. 377, 379; *Bonner* v. *Chapin National Bank*, 251 Mass. 401, 408-409; *Baskes* v. *Cushing*, 270 Mass. 230, 232; *Giles* v. *Giles*, 293 Mass. 495, 498) even though, upon an affirmative showing in the bill that the statutory procedure is inadequate, there would be concurrent jurisdiction in a court of equity to grant discovery relief. Since 1851, the efforts of the Legislature to improve discovery have been concentrated upon establishing and regulating the statutory procedure.[2] The purpose of discovery legislation will be carried out more effectively if resort to the simple statutory procedure is required, where it is adequate, leaving bills for discovery for use only with respect to matters where proper discovery under the statutes cannot be obtained. See *Durant* v. *Goss*, 12 Fed. (2d) 682 (C. C. A. 6); *Jenkins Petroleum Process Co.* v. *Sinclair Refining Co.* 62 Fed. (2d) 663 (C. C. A. 1), affirmed sub nomine *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.* 289 U. S. 689; *Pressed Steel Car Co.* v. *Union Pacific Railroad*, 240 Fed. 135, 137 (S. D. N. Y.). See also Pomeroy, Equity Jurisprudence (5th ed.) §§ 193, 197a.

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[1] The case was decided prior to the enactment of St. 1877, c. 178, § 1 (granting general equitable jurisdiction), and must be read with caution (see *Nelson* v. *Sanderson*, 285 Mass. 583, 589) because of the narrow view of equity powers then prevailing. See Reed, Equity Pleading and Practice, § 34; Story, Equity Jurisprudence (14th ed.) § 33. The case is also one in which, since substantive relief was to be denied, the bill would not normally be retained for discovery alone.

[2] The recent development of discoverey in other jurisdictions has been made largely through procedures prescribed by statute or court rule (for example, the Federal Rules of Civil Procedure, Rules 26-37; 308 U. S. 645 et seq., 329 U. S. 854-859; 335 U. S. 929-930) rather than in use of the bill for discovery in equity. See discussions in "The Bill of Discovery under Reformed Procedure," 44 Harv. L. Rev. 633, especially at page 637; James, Discovery, 38 Yale L. J. 746; Discovery Practice in States Adopting the Federal Rules of Civil Procedure, 68, Harv. L. Rev. 673.

The bill shows that, in the pending action at law, the trial judge has ruled that the plaintiff is not entitled to further discovery under the statutory procedures. Thus, the effect of entertaining a bill for discovery as to matters covered by statutory discovery would be to review by indirection the action of the trial judge. The obvious objections to this type of duplication of effort lend support to the conclusion which we reach. See *Hohmann* v. *Corkran*, 100 N. J. Eq. 234, affirmed on opinion below, 102 N. J. Eq. 333; *Hague* v. *Warren*, 142 N. J. Eq. 257, 263-268.

4. It remains for us to consider whether the plaintiff has any adequate statutory method of discovery with respect to the Edison poles and wires situated on Norumbega's land. It appears from the bill that the plaintiff was an employee of an independent contractor and not of either Edison or Norumbega. Accordingly, it is doubtful whether pre-trial access to the poles and wires (compare G. L. [Ter. Ed.] c. 234, § 35, relating to views during trial) can be given under G. L. (Ter. Ed.) c. 153, § 9, which permits an employee, injured "through some defect in the ways, works or machinery owned or used by the employer," to make an examination of them. This doubt is sufficient so that the demurrers of the corporate defendants cannot be sustained on the ground that statutory discovery is adequate. If, upon hearing on the merits, it should appear that available statutory discovery is inadequate in fact, we think that the Superior Court has discretion to permit discovery in equity to the extent of an examination, by the plaintiff or his proper representatives, of the Edison poles and wires.

Under a bill for discovery, examination of tangible personalty and real estate of a party to pending litigation may be permitted in the sound discretion of the court. *Owens-Illinois Glass Co.* v. *Bresnahan*, 322 Mass. 629, 631. *Reynolds* v. *Burgess Sulphite Fibre Co.* 71 N. H. 332. *Kynaston* v. *East India Co.* 3 Swanst. 248 affirmed sub nomine *United Co. of Merchants of England, Trading to the East Indies* v. *Kynaston*, 3 Bligh, 153, 167-168 (inspection of warehouse). *Attorney General* v. *Chambers*, 12 Beav. 159 (examination of mines). *Bennett* v. *Griffiths*, 3 E. & E. 467, 476-477 (examination of defendant's mine). See Pomeroy, Equity Jurisprudence (5th ed.) § 207b and authorities there discussed; Wigmore, Evidence (3d ed.) § 1862; Bray, Discovery (1885 ed.) pages 577-582; Notes, 33 A. L. R. 16; 13 A. L. R. (2d) 658. However, with minor exceptions, discovery was traditionally confined to property and documents owned or controlled by a party to the action. *Kelly* v. *Morrison*, 176 Mass. 531, 535-536. *American Security & Trust Co.* v. *Brooks*, 225 Mass. 500, 503-504, where the court said, "To relax the salutary rule so firmly established and thereby permit bills of discovery to be maintained against persons not parties to any proposed litigation, in a contest between others, would, in our opinion, give rise to abuses which it was intended the establishment of the rule would prevent." *Warrick* v. *Queen's College, Oxford (No. 2)*, L. R. 4 Eq. 254, 255

(documents in which a third party, as well as the defendant, had an interest not required to be produced). *Hadley* v. *McDougall*, L. R. 7 Ch. 312 (pre-trial discovery of partnership books denied against defendant's partner). Bray, Discovery (1885 ed.) pages 39-89. Compare, however, *Lefebvre* v. *Somersworth Shoe Co.* 93 N. H. 354, 357 (discovery allowed against a State agency for analysis of a fluid sent to it by the defendant); *Marsden* v. *Panshall*, 1 Vern. 407, 408 (where a pawnbroker was compelled to permit inspection of cloth wrongly pawned to him by another, the probable defendant in a proposed action); *Earl of Macclesfield* v. *Davis*, 3 V. & B. 16, 18 (where inspection was permitted of chattels in the hands of the banker of one of the defendants, referred to by Lord Eldon as "holding merely as Agent" of the defendant). *Bovill* v. *Cowan*, L. R. 5 Ch. 495, 496 (court indicated that it would inquire further into nature of joint ownership before denying discovery of jointly owned documents). *Vyse* v. *Foster*, L. R. 13 Eq. 602, 605 (preliminary discovery allowed as to partnership documents against defendants, executors of a deceased partner).

So far as these cases deny discovery with respect to the property of a person not a party to pending or proposed litigation, they seem to us distinguishable. It is plain that Edison has some interest in the poles and wires which are on the land of Norumbega. If, at the hearing on the merits, it appears that Edison, as a condition of furnishing service to Norumbega, by contract, or otherwise, has the privilege of entering the premises of Norumbega to repair, maintain, inspect, and replace the poles and wires, that is a sufficient interest in them (see *United Electric Light Co.* v. *Deliso Construction Co. Inc.* 315 Mass. 313, 316-317) to warrant granting to the plaintiff the right to examine them. Norumbega (under the somewhat unusual situation here presented) is a necessary party, not for the purpose of affording discovery itself, but merely so that the court may order it to admit the plaintiff and his representatives to its premises (without being guilty of a trespass) at a reasonable time or times to obtain discovery of property in which Edison has an interest, if the trial court shall determine in its discretion that this is necessary. Discovery procedure "must have the capacity of flexible adjustment to changing groups of facts. . . . There are few fields where considerations of practical convenience should play a larger role" (Mr. Justice Cardozo in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.* 289 U. S. 689, 693). Allowing Norumbega to be held as a party for the limited purpose here discussed is a practical and reasonable method of administering the equitable remedy of discovery.

5. It has long been regarded as appropriate to join as a party defendant in a bill for discovery against a corporation a corporate officer or officers. See *Wright* v. *Dame*, 1 Met. 237, 239-240; *Post & Co.* v. *Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341, 345; Pomeroy, Equity Jurisprudence (5th ed.) § 199b. It is unlikely that

the corporate officers of Edison and Norumbega are in any way necessary parties to obtaining the limited discovery which may be justified upon the allegations of the bill. However, at the hearing of the bill after further pleadings have been filed, it may develop that some order directed to the individual defendants (who are alleged to be in charge of the business of the corporate defendants) is appropriate with relation to any examination which may be permitted. On demurrer, we cannot say that this will not prove to be the case. Their demurrers also should have been overruled.

6. The interlocutory decree sustaining the demurrers and the final decree are reversed. The case is to stand for further pleadings and proceedings in the Superior Court consistent with this opinion. In these further proceedings, discovery is to be denied as against Norumbega and Gill (since they are not parties to the pending action at law), except that these defendants may be ordered to permit the plaintiff to examine the Edison poles and wires on Norumbega's land. Discovery as against Edison and Dignan (a) is to be denied to the extent that it is of a type which, in the discretion of the court, could be granted under the statutory procedure in the pending action at law, and (b) may be granted, in the sound discretion of the court, either to permit examination of the Edison poles and wires or, upon suitable allegations in an amended bill, as to other information, if any (of a type not obtainable by any statutory discovery), with respect to which the ancient chancery practice would have allowed discovery. The defendants are to have costs of this appeal. G. L. (Ter. Ed.) c. 261, § 12.

So ordered.

Harry J. Williams, for the plaintiff.

Charles F. Choate, (Philip Dexter with him,) for the defendants Norumbega Park-Totem Pole Corporation and another.

Merritt J. Aldrich, for the defendants Boston Edison Company and another.

DISCOVERY BY ORAL DEPOSITION OF PARTIES BEFORE TRIAL — A RECURRENT PROPOSAL

The opinion quoted in this issue on the history of discovery since the Practice Act of 1851 provides the background. As the proposal to extend the machinery for discovery is a recurrent one in Massachusetts as well as elsewhere, we call attention of the bench and bar to the discussion submitted by Messrs. Cross* and Cronin of the Boston Bar in support of a draft act for this purpose, which has been pending before the Legislature on the recommendation of the Judicial Council.

Following the memorandum we print the bill in full and invite any

* Mr. Cross is now President of the Boston Bar Association.

suggestions in regard to it. No action was taken at this year's legislative session.

The substance of the memorandum in abbreviated form, without the full text of the bill, appeared as an article in the *Boston Bar Journal* for May, 1957.

We also print a letter from Hon. Robert W. Upton, Chairman of the Judicial Council of New Hampshire and a leading trial lawyer, which was submitted to the Judiciary Committee by Mr. John R. Mullen describing the practice in that state which has existed for about 90 years.

F. W. G.

MEMORANDUM IN SUPPORT OF LEGISLATION TO PROVIDE FOR PRE-TRIAL ORAL DEPOSITIONS OF THE PARTIES IN SUPERIOR COURT

By

CLAUDE B. CROSS AND PHILIP M. CRONIN

Proposed enactment of legislation for pre-trial oral depositions of parties is not new. On January 5, 1921, the Massachusetts Judicature Commission submitted a report to the legislature recommending legislation for oral examination of the parties in a broader form than now suggested.[1]

In its Twenty-Eighth Report in 1952 the Judicial Council urged pre-trial depositions of parties.[2] The Judiciary Committee reported this bill, House 2609, favorably. It passed the House, but was rejected by the Senate. Thereafter the Judicial Council in its Twenty-Ninth, Thirtieth, Thirty-First and Thirty-Second Reports again strongly urged legislation for limited oral depositions before trial in cases pending in the Superior Court.[3]

This memorandum is in support of House 2075 in the substituted form. It is the same bill favored previously by the Judiciary Committee, passed by the House, and repeatedly endorsed by the Judicial Council.

Here are some things the legislation will accomplish:

1. The act will assist in reducing court congestion in the Superior Court, particularly jury cases. At present there are delays up to three or more years for jury trial. For this long period of time from the entry of the writ until trial, there is no real opportunity for settlement based upon a realistic appraisal of the evidence. If both sides could review the evidence early in the proceeding, and analyze the merits of the case by testimony under oath from the parties and not from assertions of counsel, there would be

[1] Massachusetts Law Quarterly, January 1921, page 151.
[2] Twenty-Eighth Report of the Judicial Council, pages 20-21.
[3] See Twenty-Ninth, Thirtieth, Thirty-First, and Thirty-Second Reports.

more and earlier settlements. Thus litigation would be more speedily concluded.

2. Settlements would be more easily effected in non-jury cases as well. Usually conflicts in evidence can be narrowed to certain issues, and with testimony under oath the parties could then assess the extent of their differences and their legal significance. Further, the question of damages could be more accurately explored, and thereby provide the parties with a fairer figure for settlement negotiations.

3. Such legislation would eliminate the pre-trial psychology of some litigants that their side is right and the other wrong in black and white terms. Once a party testifies under oath and is subjected to cross-examination he can see that all is not black and white and may then prefer financial security by a reasonable settlement rather than risk getting less or nothing by trial.

4. Depositions would facilitate the elimination from the court docket of cases having little or no merit. It is unfortunate to have to wait up to three years for a party to show that his adversary's case is without merit. With testimony under oath early in the proceedings, the case without merit or with a fatal legal defect would be quickly revealed, causing the dismissal of such actions or settlement at a nominal amount.

5. The act would facilitate shorter trials in the Superior Court by narrowing the issues actually in controversy. Presentation of evidence involving no real conflict consumes unnecessary time in some trials and the taking of oral depositions before trial would eliminate much that is uncontroverted.

6. Depositions leading to discovery would eliminate many elements of chance and surprise at the trial. Nothing is accomplished by allowing a case to go to trial with the hope that the other side is not aware of certain damaging evidence or that the adversary has failed to uncover evidence valuable to him. A trial is a serious and expensive undertaking. Its primary purpose is to arrive at the truth. The sooner in the proceeding this is done, the better the ends of justice will be served.

7. The legislation would better provide for perpetuation of testimony. Under our present laws this opportunity to preserve testimony is quite limited. The proposed legislation would provide a record admissible at the trial if the deponent was not alive or otherwise unavailable to testify.

8. Depositions would enable an opposing party to secure admissions of the other party. The admissions might be sufficiently damaging to put the party out of court, and at least could be used to great advantage in cross-examination.

9. Depositions would tie down a party's story early in the litigation when his memory is still fresh and details are not blurred. Discrepancies between his deposition and testimony at trial could be used to impeach the deponent.

These and other reasons have served to convince many other jurisdictions to provide legislation for pre-trial oral depositions. Perhaps the most sweeping provision for discovery by oral deposition is Federal Rule 30 of the Federal Rules of Civil Procedure which permits oral examination of any person, whether or not a party. The proposed legislation here is limited to parties and only in the Superior Court.

A number of states have enacted statutes or rules of court based virtually word for word on the Federal Rule. These are Delaware,[4] Florida,[5] Illinois,[6] New Jersey,[7] Nevada,[8] and Alabama.[9] Each such state allows pre-trial examination of any person, and like the Federal Rule and the proposed legislation here, the courts have supervisory power over the taking and the use of depositions, can make rulings on objectionable questions, and terminate or limit the examination.

Still other states allow oral examination of witnesses. Thus New Hampshire provides: "The deposition of any witness in a civil cause may be taken and used at the trial unless the adverse party procures him to attend. . . ."[10] New York permits oral discovery of the adverse party, his agents, employees, or witnesses, if the evidence sought is material and necessary to the action.[11] Other jurisdictions in this category are California,[12] South Carolina,[13] Texas,[14] Washington,[15] and Rhode Island.[16]

Finally, there is another group which limits oral discovery to parties. This is the proposal here. These states include Colorado,[17] Idaho,[18] Kansas,[19] Missouri,[20] Nebraska,[21] and Wisconsin.[22]

The significance of the list of states providing for depositions is obvious. As the Judicial Council said, "If the practice has worked successfully for years in other jurisdictions, where they practice law as much as they do in Massachusetts, we see no reason why it should not work here."[23]

Existing Massachusetts legislation for discovery before trial is

[4] Superior Court Rule 30.
[5] Rules of Civil Procedure 1.24.
[6] Civil Practice Act, Chapter 58, section 58; Superior Court Rule 19.
[7] Civil Practice Rules 4:16-1.
[8] Citation not available.
[9] Title 7, sec. 474(1).
[10] Chapter 517, sec. 1.
[11] Rules of Civil Practice, Rule 121-a. Speaking of depositions in New York, Justice Fuld of the Court of Appeals said: "The value of pre-trial examination, as an aid to the conduct and disposition of litigation, has been amply demonstrated by experience. There has, particularly in recent years, been a distinct trend, reflected in legislative pronouncements, in court rule and in judicial decision, towards the extension and greater liberalization of the provisions for such examination." *City of Buffalo* v. *Hanna Furnace Corp.*, 305 N. Y. 369 (1953). See also *Examinations before Trial in a State Court*, by Benjamin P. Goodman, Practising Law Institute, 1955.
[12] Code of Civil Procedure, sections 2031-2038.
[13] Code 26-701.
[14] Rule of Civil Procedure 186.
[15] Rev. Code 5.08.020, 5.08.070.
[16] General Laws, Chapter 539, section 1.
[17] Statutes 153-1-16.
[18] Code 9-1206.
[19] Statutes 60-2821.
[20] Revised Statutes 492.300.
[21] Statutes 25-1252.
[22] Statutes 326-12.
[23] Thirty-Second Report of the Judicial Council, page 7.

limited and incomplete. Written interrogatories, with a statutory restriction of thirty questions, are by their nature inflexible and otherwise unsatisfactory.[24] Interrogatories present no opportunity for probing or searching questions which are essential for discovery. Statutory provision for discovery of documents is limited to documents referred to in the pleading or particulars of the other party and relied on by the other party.[25]

The penalty for failure to admit facts is ineffective.[26] Finally, at present in Massachusetts a party may take depositions in very limited circumstances.[27] These are where the witness or party live more than thirty miles from the place of trial, where the witness or party is about to leave the Commonwealth, or where he is so aged, ill or infirm as to make it probable that he will not be able to attend trial. The statute is designed to perpetuate testimony and not for purposes of discovery. Three situations in which a deposition may at present be taken do not cover the great majority of cases.

The proposed legislation would give added relief as previously indicated and bring Massachusetts in line with the numerous jurisdictions which already provide for pre-trial oral depositions. Since the proposed legislation is in the nature of an experiment, it is limited to depositions of parties and to actions or proceedings in the Superior Court only. In summary, this is what it is suggested the proposed legislation should provide:

1. Only a party may take the deposition of another party.
2. The case must be in Superior Court.
3. The deposition must be taken where the deponent resides or works.
4. The deposition can be used for the discovery of facts and documents admissible in evidence at the trial of the case.
5. The party taking the deposition pays for costs.
6. The deposition cannot be used at trial if the deponent is present.
7. Whether or not the party is present, admissions made in the deposition are admissible.
8. The deposition can be used in cross-examining the party.
9. The testimony is under oath and taken by a stenographer who transcribes all questions and answers.
10. The Court has full control of the examination at all times and may impose conditions as to its scope and conduct.
11. Both sides have a right to examine and cross-examine the deponent.
12. By taking a deposition a party waives the right to question the adverse party by written interrogatories.
13. Only one oral examination is permissible without leave of court.

[24] General Laws, Chapter 231, section 61.
[25] General Laws, Chapter 231, section 67.
[26] General Laws, Chapter 231, section 69.
[27] General Laws, Chapter 233, section 25.

14. Agents, servants or employees of parties are likewise subject to examination.

A copy of the proposed legislation which is a revision of the bill as originally submitted is attached hereto.

DRAFT ACT

Limited Oral Discovery by Deposition Before Trial

Chapter 231 of the General Laws is hereby amended by inserting after Section 68 the following Section 68A:

Sub-Section 1. Any party in the Superior Court, after the entry of a writ or the filing of a bill or petition may examine orally any other party, in the city or town within the Commonwealth of the residence or usual place of business of the party to be examined, for the discovery of facts and documents admissible in evidence at the trial of the case. The word "party" in this act shall be deemed to include parties intervening or otherwise admitted after the beginning of a suit. Such examination may be used at the trial by the party taking the same or by any other party on paying the cost of taking the same unless the party examined is present at the trial of the case. Nothing herein shall be held to prevent the use of such examination as a declaration or admission of a party, if material, whether or not the party examined is present at the trial, or the use of such examination in connection with cross-examination of such party. Sections sixty-five, sixty-six and sixty-seven of chapter two hundred and thirty-one of the General Laws shall apply under this act.

Sub-Section 2. In order to make such examination any party may apply to a justice of the peace or notary public, who shall issue a notice to the party to be examined and all other parties to appear before said justice or notary at the time and place appointed for such examination. An attested copy of such notice shall be sent by registered mail to the party to be examined and to all attorneys of record of said party and of all other parties, not less than ten days before the date set for the examination so that they may attend.

Sub-Section 3. The party examined shall be sworn or affirmed, and his examination shall be taken in the same manner and subject to the same rules as if taken before a court. The court shall at all times have full control of the examination and may impose reasonable conditions as to its conduct and scope.

Sub-Section 4. The party requesting the examination shall be allowed first to examine on all points material to the cause in which the examination is made. The party examined or his attorney may then examine in like manner, after which any party may examine further.

Sub-Section 5. The examination shall be taken by a stenographer appointed by the justice or notary on the request of either party at his expense. Said stenographer shall be sworn by the justice or notary to transcribe faithfully the testimony, and his transcript shall be certified by the justice or notary. In case such request is

not made the deposition shall be written by the justice, notary or commissioner or by a disinterested person, in the presence and under the direction of the justice, notary or commissioner. The examination or the stenographer's transcript thereof shall be carefully read to or by the party examined and then subscribed by him.

Sub-Section 6. The examination shall be delivered by the justice, notary or commissioner to the court, before which the cause is pending, or shall be enclosed and sealed by him and directed to it, and shall remain sealed until opened by it. Copies of the deposition, however, may be furnished by the justice, notary or commissioner to any party.

Sub-Section 7. Nothing in this act contained shall prevent either party calling and examining verbally at the trial of the action any party in the same manner as though his testimony had not been taken in writing.

Sub-Section 8. If a party after due notice fails without reasonable cause to attend and submit himself to examination under this act, the court may make and enter such order, judgment or decree as justice requires.

Sub-Section 9. No one without leave of court shall both examine any other party orally under this act and interrogate him in writing under General Laws, chapter two hundred and thirty-one, sections sixty-one to sixty-seven, and no party shall be required to attend and submit himself to examination more than once in the same case except by order of the court.

Sub-Section 10. A party in the Superior Court may examine orally an agent, servant or employee of an adverse party in the same manner and under the same conditions as provided for the examination of a party in the foregoing sub-sections. The examination of no more than one such agent, servant or employee may be taken in any case except by order of court. A person subject to examination under this sub-section may be summoned and compelled to testify in like manner and under the same penalties as are provided for a witness before the court.

THE NEW HAMPSHIRE PRACTICE

Copy of letter from Hon. Robert Upton, former U. S. Senator from New Hampshire, Chairman of the N. H. Judicial Council, and one of the leading Trial Lawyers. This letter was submitted by Mr. Mullen to the Judiciary Committee at the hearing on the Bill for depositions of parties for discovery. F. W. G.

John M. Mullen, Esq.
Dear Mr. Mullen:

Your letter of the 11th inst. relative to the use of depositions in civil actions is before me. You request some comment upon our experience in the taking and use of oral depositions in civil actions.

The taking and use of depositions is authorized by RSA 512:1 as follows:

> "The deposition of any witness in a civil cause may be taken and used at the trial, unless the adverse party procures him to attend so that he may be called to testify when the deposition is offered."

The right to take depositions is unrestricted, but is subject to an important qualification contained in RSA 516:23 as follows:

> "Party Deponent. No party shall be compelled, in testifying or giving a deposition, to disclose the names of the witnesses by whom nor the manner in which he proposes to prove his case, nor, in giving a deposition, to produce any writing which is material to his case or defense, unless the deposition is taken in his own behalf."

In practically every civil case of importance, depositions are taken not only of the parties, but also of hostile or unfriendly witnesses. The practice is so general that depositions are customarly taken under agreement dispensing with the statutory formalities, such as notice and filing. At the trial, the witnesses whose depositions have been taken are commonly in attendance and the chief use of depositions is for contradiction and impeachment.

The preparation of a case is greatly facilitated by the taking of depositions as it enables the parties to test the truth of the witnesses' testimony by investigation in advance of the trial, insead of during the trial. In the greater majority of cases, depositions are taken by both plaintiff and defendant and this is true of actions in equity as well as actions at law. In general, the taking of depositions reduces the possibility of surprise and tends to develop the truth.

In this jurisdiction, discovery by oral depositions is supplemented by simple procedure for the discovery and production of documentary evidence. Whether the taking of depositions increases the cost of preparation is conjectural as depositions frequently save time in investigation. Of greater importance is the effect which taking depositions has on negotiations for settlement. The Bar generally would agree that as a result of depositions, many cases are settled which otherwise would be tried.

Our lawyers, engaged in trial practice, regard the right to take depositions as necessary to the preparation and trial of cases. We find that the right to take depositions promotes justice and reduces the volume of litigation.

Very truly yours,
Robert W. Upton

A FRONTIER OF MASSACHUSETTS JUSTICE

by

ALBERT WEST

There is, on the banks of the Kennebec River in what is now Dresden, Maine, a venerable old building which in the latter half of the 18th century was a Massachusetts Court House. Here some of the most famous judges and lawyers in the Commonwealth's history appeared.

In view of the coming of Mayflower II, it is interesting to recall that all of the land along the Kennebec River, from Merrymeeting Bay to the Falls above Augusta, for 15 miles on each side, was owned by the Pilgrims and played an important part in saving the Plymouth Colony from financial disaster.

Every school boy knows that the Pilgrims were befriended by Samoset who boldy walked among them on the 16th of March 1621, and said, "Welcome Englishmen." What is not generally known is that Samoset, who came from Pemaquid, Maine, gave one of the first deeds of land in America to one John Brown on July 15, 1625. He undoubtedly told the Pilgrims about the possibility of profitable trading with the Indians which induced them to send a shallop, in 1626, with corn for trading. They went up a river called "Kenibeck" and brought back 700 weight of beaver skins. Sensing that this was a means of paying their debt to the London Merchant Adventurers who had financed them they dispatched one of their number, Isaac Allerton, to England to, among other things, "procure a patent for a fitt trading place in ye River of Kenibeck."

Allerton returned in 1628, but the patent he had secured "was so straite and ill-bounded as they were faine to renew and enlarge it the next year." But while waiting "they now erected a house up above in ye river (Kennebec) in ye most convenientest place for trade, as they conceived, and furnished the same with commodities for ye end, both winter and somer, not only with corne, but also with such other commodities as ye fishermen had traded with them, as coats, shirts, ruggs, and blankets, biskett, pease, prunes, &c."

In 1629, Allerton was more successful, and the new patent now provided, "The said Council hath further given, granted, bargained, sold, infeeoffed, alloted, assigned, and set over, and by these presents do clearly and absolutely give, grant, bargain, sell, allieve, enfeeoff, allot, assign and confirm unto ye said William Bradford, his heirs, associates, and assigns, all that tract of land or part of New England in America aforesaid, which lyeth within or between, and extendeth itself from ye utmost limits of Cobiseconte, which adjoyneth to ye river of Kenibeck, towards the western ocean, and a place called ye falls of Nequamkick in America, aforesaid: and ye space of fifteen

English myles on each side of ye said river, commonly called Kenibeck River, and all ye said river called Kenibeck that lyeth within the said limits and bounds, eastward, westward, northward, and southward, last above mentioned: and all lands, grounds, soyles, rivers, waters, fishing, &c. And by virtue of ye authority to us derived by his late Majesty's letters patents, to take, apprehend, seize, and make prize of all such persons, their ships and goods as shall attempt to inhabit or trade with ye savage people of that countrie within ye several precincts and limits of his and their several plantations, &c."

As early as 1625, Edward Winslow had established a trading post where the remains of Fort Western now stand in Augusta. And with the establishment by the patent of the ownership in the territory, a permanent trading post was established and John Howland placed in command. Very successful trade with the Abenakis Indians was quickly established "all which tooke good effect," as William Bradford noted in his journal.

So successful was the trading that it began to attract interlopers, chief of whom, and by far the ugliest, was one Hocking who came from "Piscataway" in 1634 (Portsmouth, N. H.). He had made trouble with the Indians earlier in Brunswick and now artfully deposited himself on the Kennebec in a spot above the Pilgrim trading post at Augusta and thereby intercepted the Indians as they came down to trade. Since he was a trespasser, this did not set well with the Pilgrims. John Alden, (made famous by another man from Maine, Henry Wadsworth Longfellow) who had just arrived in his shallop, conferred with John Howland as to what was best to do, and it was decided to warn him off. This had no effect. They gave him a second warning but he continued to defy them.

Then it was decided to cut the cables of Hocking's boat and float him downstream. Two men were dispatched in a canoe, and they succeeded in cutting one of the cables. While they were cutting the other, Hocking shot one of them dead, whereupon the other man killed Hocking.

On his return to Plymouth, Alden stopped in Boston and was immediately arrested by the Boston magistrates for having been present at a double murder. Bradford, incensed at such an interference where there was neither jurisdiction nor authority sent Myles Standish to Boston immediately with instructions to secure Alden's release. Relations between the Plymouth and the Massachusetts Bay colonists had never been so precarious. Captain Standish was sufficiently persuasive, it seems, and Alden was quickly released.

There is some indication from Governor Dudley's correspondence with Governor Bradford that Captain Standish was in no mood for trifling; for there is a reference in his correspondence that "this unhappie contention between you and us" and a further expression that "time cooleth distempers."

The Pilgrims' only interest in holding this land was to pay off their debt which had been agreed upon as £1800 sterling. A contract was a sacred thing to them, and they were willing to suffer the hardships and dangers of going into this wilderness to pay off what they owed. And pay it off they did.

When all their obligations had been met in full they sold the entire tract, giving a deed through William Bradford to Antipas Boyes, Edward Tyng, Thomas Brattle and John Winslow for £400 sterling. This became known as the Kennebec Purchase. A period of 88 years elapsed before any attempt at settlement was made, however. A corporation was formed and on October 31, 1750, at a meeting at the Bunch of Grapes Tavern (now the Exchange Building on State Street, Boston) Samuel Goodwin of Charlestown was

PHOTOGRAPH BY RICHARD P. SPILLANE

OLD COURT HOUSE AT POWNALBOROUGH

appointed agent of the Kennebec proprietors and instructed to make a survey of the patent. Inducements were offered to encourage settlers to inhabit the area. A township was established which was known as Frankfort and a fort was built and named Fort Shirley after the Governor. In 1760 Lincoln County was incorporated by the Massachusetts Great and General Court and the Plantation of Frankfort was renamed Pownalborough, after the new Governor, and incorporated at the same time and established as the shiretown.

The Courthouse came to be built because the judges called attention to the fact that there was no suitable building in which to hold the courts and it was in the best interest of the proprietors that Pownalborough be the place for holding them.

On April 13, 1761, the proprietors of the Kennebec Purchase voted "to build a courthouse within the parade grounds of Fort Shirley (which had been demolished by this time), 45′ x 44′, 3 stories; one room in the second story 45′ x 20′, to be fitted with boxes and benches, &c, needful of a courtroom; the easternmost block-house of Fort Shirley, with the land on which it stands, to be appropriated for a gaol, and the easterly part of the barrack to be appropriated for a house for the gaol-keeper. And all to be for the use of the county for twenty-one years."

One of the first judges to sit was William Cushing of Scituate later to become Chief Justice of Massachusetts and a charter member of the United States Supreme Court. Mr. Justice Cushing is the only man in our history to refuse the Chief Justiceship of the United States after being appointed by Washington and confirmed by the Senate. He declined for the reason that his health would not permit the additional duties required. He continued as an associate justice for a period of 14 years. It is interesting to note in passing that had he accepted, John Marshall never would have become Chief Justice.

With Cushing, to this wilderness came his brother Charles and Jonathan Bowman, both lawyers. Charles Cushing served as Sheriff of Lincoln County and Bowman as Clerk of Courts and later Judge of Probate. Bowman and Charles Cushing were both members of the celebrated class of 1755 at Harvard and close friends of their distinguished classmate, John Adams of Braintree. Bowman was a cousin of John Hancock.

In the Spring of 1765 John Adams came to the Pownalborough courthouse as counsel for the Kennebec proprietors. The story of his journey there is found in his Life and Correspondence as follows:

"In the spring of 1765 Mr. Adams, at the recommendation of Mr. Oxonbridge Thacher, was engaged to attend the Superior Court at Pownalborough, on Kennebec River. That place was then at almost the remotest verge of civilization, and it was with the greatest difficulty that he was enabled to reach it. After encountering the ob-

structions of nearly impassable roads, through an inhospitable region, then falling sick upon the way, he succeeded in reaching Pownalborough and gained his cause, much to the satisfaction of his client. * * *" It induced the Plymouth Company to engage him in all their causes. It is said, and with reason, that Mr. Adams travelled on horseback, guided through the woods by blazed trees.

Some of the prominent Massachusetts judges who sat at Pownalborough in addition to William Cushing, were David Sewall, Increase Sumner, later Governor of Massachusetts, Nathaniel Peasley Sergeant, Francis Dana, Nathan Cushing, Robert Treat Paine, a signer of the Declaration of Independence, Thomas Dawes and James Sullivan, who was also attorney general and later Governor of the Commonwealth. Sullivan was admitted to the Bar in this building. Among other distinguished lawyers to have argued in this building are Robert Auchmuty, the younger, Theophilus Parsons and Nathan Dane.

Robert Treat Paine is reputed to have been a man of stern visage and short temper and was apparently an advocate of what we now call "blue laws" for in 1792 he drafted a bill which strictly prohibited unnecessary traveling on Sunday. A few months afterwards Judges Robert Treat Paine and Increase Sumner, accompanied by James Sullivan, then attorney general, having adjourned court in Portland on Saturday and being very anxious to open court early on Tuesday at Pownalborough, started with their horses and carriages, accompanied by other officers of the court, to drive to Bath on Sunday, whence they were to proceed up Kennebec River in boats on Monday. As they approached Freeport, the people felt much scandalized by their action, thinking that the law should apply to court officers as well as to other citizens, and the warden arrested them all for violating the Sunday law. They were indicted, and forced to petition the Legislature for relief. Their petition, dated June 30, 1792, was signed by Paine and Sumner, and set forth, among other considerations, that under the law they were exempt from arrest because it was absolutely necessary that they should travel on Sunday, that they might fill their engagement at Pownalborough on Tuesday. By act of the Legislature the proceedings against them were stayed. A printed copy of their petition to the Legislature may be found in PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY, Vol. XIX, p. 252, 1882.

This building continued to be used as a courthouse until about 1795 when the shiretown of Lincoln County was changed to what is now Wiscasset. And thus it may be seen that this fine old building, which was recently purchased by the Lincoln County Cultural and Historical Association who plan to restore it to its original condition, began and ended as a Massachusetts Courthouse.

ADMINISTRATIVE AND LEGAL PROBLEMS IN NUCLEAR ENERGY

Review of "The Economics of Nuclear Power" 513 pp. Series VIII
Published in the United States by McGraw Hill
Book Co., Inc. New York (1957) $17.00

By: JAMES B. MULDOON

The new problems of law which have arisen as the result of the peaceful development of atomic energy have not yet been fully appreciated by many of us. Several sections in this latest volume of an eight volume series on Progress in Nuclear Energy are devoted to the every-day problems which may be encountered in the rapidly expanding use of nuclear energy in place of the more well-known sources of power.

This is definitely not a book which one might "curl up with" on a summer evening but it is nonetheless a stimulating and thought provoking discussion of what the future holds in store for attorneys who occupy themselves in work which ranges from financing, construction, and the law of public utilities to the more familiar practice which may cover tort litigation and workmen's compensation claims.

In the broader aspect, no one, apparently, is overly enthusiastic over the possibility that some atomic installation might be erected in his back yard, but from the projection of the needs for increased power in the next two generations, it becomes obvious that reactor power plants, fuel fabrication installations, fuel processing plants, storage installations, and other such unnatural facilities will inevitably become a part of the landscape before most of us shuffle off to a better environment.

The introduction of these amazing and potentially dangerous items into our midst revitalizes the doctrine of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) where it was held that one "who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damages which is the natural consequences of its escape." See American Restatement of Torts §159.

Knowing the inherently dangerous propensities of fissionable materials and the horrible effects of radiation, we may well be reluctant to face the inevitable but it must come.

The articles in this volume discuss the possibilities of loss and damage of life and property and the protective measures which should be taken.

There is also the aspect of providing insurance against loss and damage as the result of the negligent handling of such materials, and it is interesting to note that the insurance industry has recently arrived at the awesome conclusion that the catastrophe potential is more serious than anything now known in the insurance industry but that the possibility of a serious catastrophe seems very remote. In addition to the production of atomic fuel and the use of such

fuel for the production of power, there is also the extremely important problem of the disposal of atomic waste. Careless disposal of such materials can be as catastrophic as any other danger potential inherent in the picture.

It is understood that even here in Massachusetts, the development of atomic energy is being held up because of the underwriting problems involved. There is little or no data available which would allow the sound appraisal of the problems involved and it seems to be the thought of many that the Federal Government should assume the risks involved.

At least as important as any other consideration previously mentioned is the problem of the protection of the workers and the public from the effects of radiation and other dangers. Self-regulation is now inadequate without exception and therefore the matter is wide open for legislative action.

This volume points out that the simplest radiation legislation now proposed is the Massachusetts idea which would (or does) authorize the Department of Public Health to carry out such protective measures as it deems necessary and which are in accordance with the recommendations of the National Committee on Radiation Protection.

The reader will probably reach the conclusion that a great deal is being left to trial and error and this reviewer has a suspicion that this is not far from being correct.

The Workmen's Compensation problem is fully treated in this study by Bruce A. Greene of the U. S. Department of Labor. The suggestions made are that workers in nuclear energy be fully protected by the workmen's compensation laws. The effects of radiation would give rise to an "occupational disease" and should be treated as such. It is suggested that there be no limit on medical assistance and that the Board be given the assistance of a special group of medical advisors on this particular problem. Of the problems facing the employee in connection with a compensation claim arising out of and in the course of his employment at a nuclear installation, one of the most serious is the fact that the disease might not become apparent or acute for 5 or 10 years. Under present Massachusetts law, a claim filed after several years would not be recognized. So little is known about these diseases that the medical evidence now demanded by the Board might not be available. There is a thought that there should be a presumption of disability (in these cases) and that the burden should be on the employer to show that the sickness or disease did not arise out of the work. These suggestions and concepts will undoubtedly strike horror in the minds of the insurance companies who must face an underwriting problem of great magnitude in such cases. The matter is still wholly unresolved and it may be that the Federal and State governments will be forced into the picture as reinsurers.

After giving consideration to the many problems presented by this study of the administrative and legal problems of nuclear

energy, one is forced to the conclusion that too little is being done to educate the public and the bar. There is a tremendous task ahead and it is highly appropriate that the bar should play an important role.

THE GOVERNMENT OF THE COMMONWEALTH OF MASSACHUSETTS

Review of "This is Your Massachusetts Government—City—Town—State" (1956), paper $1.75, cloth $3.50

By ELWYN S. MARINER.

By: ALBERT WEST

Since the advent of the Student Government Day Program of the Massachusetts Civic League—the day when the high school students of the Commonwealth "take over" the State Government at the State House—there has arisen an increased awareness for the need of an authoritative manual of the State Government.

To be sure your reviewer, with Philip K. Allen of Andover, who did the lion's share of the work, put together a simple outline of the State Government for use by the students. This met with marked success and went into five editions. (*Your Massachusetts Government.* Massachusetts Civic League. Paper @ 25c) mainly because there wasn't any other manual on the State Government available. Since then the League of Women Voters have put out an excellent study of the Government of Massachusetts (*Massachusetts State Government — A Citizen's Handbook* — Harvard University Press @ $6.00) and William J. Reid of the Boston School Department and Herbert G. Regan of the State Teachers College, Boston, have written *Massachusetts—History and Government of the Bay State* (Oxford Book Company 1956) this is a text book for secondary schools and is a good history and outline of the State Government but it contains some obvious shortcomings in the section devoted to the history and development of the Constitution of the Commonwealth.

In 1956 the Massachusetts Bar Association in conjunction with the Special Commission on the Observance of the 175th Anniversary of the Constitution of Massachusetts published a pamphlet, *Our Massachusetts Constitution—Its History and Purpose.* This was largely the work of Frank W. Grinnell and Joseph Lee then Chairman of the Boston School Committee — dedicated to the teaching of our constitutional heritage in the schools—with some assistance by your reviewer. This was distributed as a public service to every secondary school and every library in the Commonwealth and has served a great purpose.

In October 1956 Elwyn E. Mariner, Research Director of the Massachusetts Taxpayer's Association wrote, *This Is Your Massachusetts Government—A Description of the Structure and Functions*

of the State and Local Governments of the People of the Commonwealth of Massachusetts. This should be standard equipment of every law office in Massachusetts. It is a painstaking survey of the State Government and a complete outline of the governments of the several cities and towns. It is the best effort in this direction because of succinctness of information and price. It is obtainable from the author, E. E. Mariner, Box 22, Arlington Heights 75, Massachusetts.

COMMONWEALTH OF MASSACHUSETTS

Administrative Committee of the District Courts

TO THE JUSTICES AND CLERKS OF THE DISTRICT COURTS:

July 1, 1957

Pursuant to the provisions of G. L., Chapter 218, Section 43A inserted by Chapter 682 of the Acts of 1941 the following requirement as amended is hereby promulgated effective as of July 1, 1957.

The number of simultaneous sessions previously allotted to the various courts is hereby revoked as of July 1, 1957, and the following number is hereby apportioned for the period between July 1, 1957 and January 1, 1958.

There has been no change made in the number of simultaneous sessions allotted to the courts in the second Barnstable district and in Dukes and Nantucket.

The revision of this requirement has been necessitated by the amendment of G. L. Chapter 218, Section 77A by Chapter 738 of the Acts of 1956 requiring civil cases with specified exceptions and for limited periods of time to be heard by full time justices.

REQUIREMENT NO. III

Simultaneous sessions may be held during the period set forth above not to exceed five in number in the following named courts:

District Court of Northern Berkshire
Fourth District Court of Berkshire
District Court of Southern Berkshire
District Court of Williamstown
District Court of Lee
Fourth District Court of Bristol
District Court of Eastern Essex
Third District Court of Essex
District Court of Eastern Franklin
District Court of Eastern Hampden
District Court of Eastern Hampshire
District Court of Marlborough
First District Court of Northern Middlesex
District Court of Natick
District Court of Southern Norfolk
Third District Court of Southern Worcester
Second District Court of Southern Worcester

Second District Court of Eastern Worcester
District Court of Leominster
District Court of Western Worcester
First District Court of Southern Worcester
District Court of Winchendon
District Court of Holyoke
District Court of Franklin
District Court of Chicopee
Second District Court of Plymouth
District Court of Newburyport
Fourth District Court of Plymouth
Second District Court of Essex
Third District Court of Plymouth

Simultaneous sessions may be held during the period set forth above not to exceed ten in number in the following named courts:

First District Court of Eastern Worcester
First District Court of Barnstable
District Court of Central Berkshire
First District Court of Bristol
Central District Court of Northern Essex
District Court of Western Hampden
First District Court of Southern Middlesex
District Court of Central Middlesex
First District Court of Northern Worcester
District Court of Fitchburg
Municipal Court of the South Boston District
District Court of Newton
Municipal Court of the Brighton District
Municipal Court of the Charlestown District
Fourth District Court of Eastern Middlesex
District Court of Peabody

Simultaneous sessions may be held during the period set forth above not to exceed twenty-five in number in the following named courts:

Second District Court of Bristol
Third District Court of Bristol
District Court of Lawrence
First District Court of Essex
District Court of Hampshire
District Court of Lowell
District Court of Somerville
District Court of Northern Norfolk
Municipal Court of Brookline
District Court of Western Norfolk
District Court of Brockton
District Court of Chelsea
East Boston District Court
Municipal Court of the West Roxbury District

Simultaneous sessions may be held during the period set forth above not to exceed fifty in number in the following named courts:

District Court of Southern Essex
Second District Court of Eastern Middlesex
Municipal Court of the Dorchester District
Central District Court of Worcester
District Court of Springfield
Third District Court of Eastern Middlesex
Municipal Court of the Roxbury District

Simultaneous sessions may be held during the period set forth above not to exceed one hundred in number in the following courts:

First District Court of Eastern Middlesex
District Court of East Norfolk

It is not a simultaneous session when a Special Justice is sitting in a court under the following conditions:

1. In place of the Standing Justice when the latter is on vacation.
2. In place of the Standing Justice when the latter is absent because of sickness, under General Laws, Chapter 218, Section 6, as amended by Chapter 744, Acts of 1956.
3. In place of the Standing Justice when the latter is acting in the Appellate Division of District Courts, under General Laws, Chapter 231, Section 108.
4. In place of the Standing Justice when the latter is sitting in the Superior Court under General Laws, Chapter 212, Section 14B.
5. In place of the Standing Justice when the latter is absent due to an assignment on or by the Administrative Committee, under General Laws, Chapter 218, Section 6, as amended by Section 1, Chapter 738, Acts of 1956, and Section 1, Chapter 744, Acts of 1956.
6. In place of the Standing Justice when the latter is absent from his Court because of service as a member of the Administrative Committee under General Laws, Chapter 218, Section 6, as amended by Section 1, Chapter 738, Acts of 1956, and Section 1, Chapter 744, Acts of 1956.

It also is not a simultaneous session when a full time Judge is sitting in a court other than his own on civil business under assignment by the Administrative Committee, under General Laws, Chapter 218, Section 77A, as amended by Chapter 738 of the Acts of 1956, (Section 2).

GENERAL RULES

1. During the period between July 1, 1957 and September 1, 1957 any Judge or Special Justice who may be presiding may hear and determine all matters pending before the court with the exception of actions of contract, tort or replevin.

2. No civil cases shall be assigned for hearing in any district court during July and August excepting however a full time Judge may hear such cases in his own court.

3. Sittings of the full time Justices on civil cases in all the district courts shall be from 10:00 A.M. to 4:00 P.M. with the usual recess for luncheon.

ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

KENNETH L. NASH, *Chairman*
FRANK L. RILEY
ERNEST E. HOBSON
ARTHUR L. ENO
DANIEL W. CASEY